APPENDIX A

OPINION OF THE COURT

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12,927

DISTRICT OF COLUMBIA, PETITIONER

v.

RADIO CORPORATION OF AMERICA, RESPONDENT

Petition for Review of Decision of the District of Columbia Tax Court

Decided April 5, 1956

Mr. Henry E. Wixon, Assistant Corporation Counsel for the District of Columbia, with whom *Messrs. Vernon E. West*, Corporation Counsel, *Chester H. Gray*, Principal Assistant Corporation Counsel, and *George C. Updegraff*, Assistant Corporation Counsel, were on the brief, for petitioner.

Mr. Loftus E. Becker for respondent. *Messrs. Robert G. Zeller* and *John A. Gilmore* were on the brief for respondent. *Mr. James E. Greeley* also entered an appearance for respondent.

Before WILBUR K. MILLER, BAZELON and DANAHER *Circuit Judges.*

WILBUR K. MILLER, *Circuit Judge:* The question in this case is whether the District of Columbia must

refund certain franchise taxes paid under protest by the Radio Corporation of America.

The Income and Franchise Tax Act of 1947, as amended, § 47-1551 *et seq.*, D. C. Code (1951), imposes a franchise tax upon every corporation and unincorporated business "for the privilege of carrying on or engaging in any trade or business within the District and of receiving such other income as is derived from sources within the District . . . ." The measure of the tax is that portion of the corporation's net income "as is fairly attributable to any trade or business carried on or engaged in within the District and such other net income as is derived from sources within the District . . . ." § 47-1580. It is provided by § 47-1580a: ". . . Where the net income of a corporation or unincorporated business is derived from sources both within and without the District, the portion thereof subject to tax under this article shall be determined under regulation or regulations prescribed by the Commissioners. . . ."

August 31, 1948, the Commissioners of the District promulgated regulations pursuant to the statutory authority quoted above, which include the following:

> Sec. 10-2(d). ". . . If the trade or business is carried on partly within and partly without the District, that portion of the gross income from trade or business to be apportioned to the District shall be determined as follows:"
>
> Sec. 10-2(d)(1)a. "Where gross income for any taxable year is derived from the manufacture and sale or purchase and sale of tangible personal property, the portion thereof to be apportioned to the District shall be such percentage of the total of such gross income as the District sales made during such taxable year bear to the total sales made everywhere during such taxable year. For the purpose of this regulation the phrase 'District sales' shall mean the gross re-

ceipts from all sales made which were principally secured, negotiated, or effected by owners, employees, agents, officers and branches of the corporation or unincorporated business *located* in the District; and the phrase 'total sales' shall mean the gross receipts from all sales." [Emphasis supplied.]

It was also provided that "these regulations shall apply to the taxable year or part thereof beginning on the first day of January, 1948, and to succeeding taxable years."

RCA seasonably filed with the Assessor of the District franchise tax returns for the calendar years 1949, 1950 and 1951 and paid the taxes disclosed thereby. The returns were prepared in accordance with the allocation provisions of the 1948 regulations.

March 17, 1953, the Commissioners amended § 10-2(d)(1)a of the 1948 regulations by eliminating therefrom the word "located" which we have italicized above. August 6, 1953, the section was further amended to read in pertinent part as follows:

"... If the trade or business is carried on partly within and partly without the District, that portion of the net income from trade or business to be apportioned to the District shall be determined as follows:

"(1) Income from sales of tangible personal property.

"a. Where income for any taxable year is derived from the manufacture and sale or purchase and sale of tangible personal property, the portion thereof to be apportioned to the District shall be such percentage of the total of such income as the District sales made during such taxable year bear to the total sales made everywhere during such taxable year. . . . For the purpose of this regulation, the phrase 'District sales' shall mean all sales to District customers the income

> from which is fairly attributable to the trade or business carried on or engaged in within the District, including solicitation in the District by salesmen or other representatives of the taxpayer, that portion of sales to customers outside the District the income from which is fairly attributable to the trade or business carried on in the District, and sales of tangible personal property the income from which is from District sources."

It was also provided that the regulations as amended August 6, 1953, "shall apply to the taxable year or part thereof beginning on the first day of January, 1948, and to succeeding taxable years."

It will be observed that the August, 1953, amendment substantially broadens the basis upon which income attributable to sales in the District must be allocated to the District.

Conceiving that the regulations as amended in 1953 should govern the computation of the respondent's franchise taxes for the years 1949, 1950 and 1951, the Assessor of the District on September 21, 1954, calculated thereunder and assessed against RCA deficiencies in franchise taxes for the three years in question aggregating $112,653.50 plus interest in the sum of $23,424.87. The additional taxes and interest demanded were paid under protest by the respondent October 5, 1954, and on December 17, 1954, RCA filed this proceeding in the District of Columbia Tax Court for the refund of the sums so paid, with the exception of a small amount which it conceded to be due under the 1948 regulations. The Tax Court decided in favor of the taxpayer and this petition for review was filed by the District.

The District insists that the 1948 regulations were wholly invalid and that consequently the 1953 regulations were the only ones which could be applied under the statute. In *Lever Bros. Co.* v. *District of*

Columbia, 92 U.S.App. D. C. 147, 204 F. (2d) 39 (1953), we considered and held valid the apportionment formula contained in § 10-2(d)(1)a of the 1948 regulations. We adhere to that holding. The 1953 amendment does not operate retroactively. The respondent's franchise tax liability for the years 1949, 1950 and 1951 should have been determined, as the Tax Court held, under the regulations then in force. *Helvering* v. *R. J. Reynolds Tobacco Co.*, 306 U. S. 110 (1939).

Affirmed.

JUDGMENT OF THE COURT

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12,927

APRIL TERM, 1956

DISTRICT OF COLUMBIA, PETITIONER,

v.

RADIO CORPORATION OF AMERICA, RESPONDENT.

Petition for Review of Decision of the District of Columbia Tax Court

---

Before: WILBUR K. MILLER, BAZELON and DANAHER, *Circuit Judges.*

JUDGMENT

This case came on to be heard on the record from the District of Columbia Tax Court, and was argued by counsel.

On Consideration Whereof, It is ordered and adjudged by this court that the decision of the said Tax Court on review in this case be, and the same is hereby, affirmed, with costs.

Dated: April 5, 1956.

Per Circuit Judge Wilbur K. Miller.

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit
Filed Apr 5, 1956
Joseph W. Stewart, Clerk

APPENDIX B

STATUTES, AND REGULATIONS PROMULGATED BY THE COMMISSIONERS OF THE DISTRICT OF COLUMBIA

Statutes Involved

District of Columbia Income and Franchise Tax Act of 1947, 61 Stat. 328, ch. 258, as amended by the Act of May 3, 1948, 62 Stat. 206, ch. 246, and by Title IV, District of Columbia Revenue Act of 1949, 63 Stat. 112, ch. 146, and by Title XII, of the District of Columbia Public Works Act of 1954, 68 Stat. 101, ch. 218:

Section 4(h), Article I, Title I (Sec. 47-1551c(h), D. C. Code, 1951).

"SEC. 4. GENERAL DEFINITIONS.—For the purposes of this article and wherever appearing herein, unless otherwise required by the context—

* * *

"(h) The words 'trade or business' include the engaging in or carrying on of any trade, business, profession, vocation or calling or commercial activity in the District of Columbia; and include the performance of the functions of a public office:[1] *Provided, however,* That the words 'trade or business' shall not include, for the purposes of this article—

"(1) Sales of tangible personal property whereby title to such property passes within or without

[1] As originally enacted in 1947, Sec. 4(h) ended with the words "public office." The proviso to this section was added in its entirety by the Act of May 3, 1948, 62 Stat. 206, ch. 246.

the District, by a corporation or unincorporated business which does not physically have or maintain an office, warehouse, or other place of business in the District, and which has no officer, agent, or representative having an office or other place of business in the District, during the taxable year; or

"(2) Sales of tangible personal property by a corporation or unincorporated business which does not maintain an office or other place of business in the District and which has no office, agent, or representative in the District except for the sole purpose of doing business with the United States, but such corporations and unincorporated businesses shall be subject to the licensing provisions in title XIV of this article.

"For purposes of this proviso, the words 'agent' or 'representative' shall not include any independent broker engaged independently in regularly soliciting orders in the District for sellers and who holds himself out as such."

Section 1, Article I, Title III (Sec. 47-1557, D. C. Code, 1951).

"SEC. 1. NET INCOME.—For the purposes of this article and wherever appearing herein, unless otherwise required by the context, the words 'net income' mean the gross income of a taxpayer less the deductions allowed by this article."

Section 2(a), Article I, Title III (Sec. 47-1557a. (a) and Sec. 47-1557a.(b) (13), D. C. Code, 1951).

"SEC. 2. GROSS INCOME AND EXCLUSIONS THEREFROM.—(a) The words 'gross income' include gains, profits, and income derived from salaries, wages, or compensation for personal services of whatever kind and in whatever form paid, including salaries, wages, and compensation paid by the United States to its officers and employees to the extent the same is not exempt under this article, or income derived from any trade or business or sales or dealings in property whether real or personal, other than capital assets as defined in

this article, growing out of the ownership, or sale of, or interest in, such property; also from rent, royalties, interest, dividends, securities, or transactions of any trade or business carried on for gain or profit, or gains or profits, and income derived from any source whatever.

"(b) The words 'gross income' shall not include the following:

* * * * * * *

"(13) Income derived from the sale of tangible personal property to the United States by corporations and unincorporated businesses having their principal places of business located outside the District, which property is delivered from places outside the District for use outside the District: *Provided, however,* that the taxpayer shall furnish to the Assessor a statement in writing of the amount of gross sales so made and, if required by the Assessor, a list of the names of the agencies of the United States through which such property was sold."[2]

Sections 1 and 2, Article I, Title VII (Sec. 47-1571 and 47-1571a., D. C. Code, 1951).

"SEC. 1. TAXABLE INCOME DEFINED.—For the purposes of this title, and unless otherwise required by the context, the words 'taxable income' mean the amount of net income derived from sources within the District within the meaning of title X of this article."

"SEC. 2. IMPOSITION AND RATE OF TAX.—For the privilege of carrying on or engaging in any trade or business within the District and of receiving income from sources within the District, there is hereby levied for each taxable year a tax at the rate of 5 per centum upon the taxable income of every corporation, whether domestic or foreign (except those expressly exempt under title II of this article)."

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[2] As originally enacted in 1947, the Franchise Tax Act did not include paragraph (13). This paragraph was added by the Act of May 3, 1948, 62 Stat. 206, ch. 246.

Sections 1 and 2, Article I, Title X (Sec. 47-1580 and 47-1580a., D. C. Code, 1951).

"SEC. 1. PURPOSE OF ARTICLE.—It is the purpose of this article to impose (1) an income tax upon the entire net income of every resident and every resident estate and trust, and (2) a franchise tax upon every corporation and unincorporated business for the privilege of carrying on or engaging in any trade or business within the District and of receiving such other income as is derived from sources within the District: *Provided, however,* That, in the case of any corporation, the amount received as dividends from a corporation which is subject to taxation under this article, and, in the case of a corporation not engaged in carrying on any trade or business within the District, interest received by it from a corporation which is subject to taxation under this article shall not be considered as income from sources within the District for the purposes of this article. The measure of the franchise tax shall be that portion of the net income of the corporation and unincorporated business as is fairly attributable to any trade or business carried on or engaged in within the District and such other net income as is derived from sources within the District:[3] *Provided, further,* That income derived from the sale of tangible personal property by a corporation or unincorporated business not carrying on or engaging in trade or business within the District as defined in title I of this article shall not be considered as income from sources within the District for purposes of this article, with the exception of income from sales to the United States not excluded from gross income as provided in title III, section 2(b)(13) of this article."

"SEC. 2. ALLOCATION AND APPORTIONMENT.—The entire net income of any corporation or unincorporated business, derived from any trade

[3] As originally enacted in 1947, this section ended with the words "the District." The proviso following those words was added by the Act of May 3, 1948, 62 Stat. 206, ch. 246.

or business carried on or engaged in wholly within the District shall, for the purposes of this article, be deemed to be from sources within the District, and shall, along with other income from sources within the District, be allocated to the District. If the trade or business of any corporation or unincorporated business is carried on or engaged in both within and without the District, the net income derived therefrom shall, for the purposes of this article, be deemed to be income from sources within and without the District. Where the net income of a corporation or unincorporated business is derived from sources both within and without the District, the portion thereof subject to tax under this article shall be determined under regulation or regulations prescribed by the Commissioners. The Assessor is authorized to employ any formula or formulas provided in any regulation or regulations prescribed by the Commissioners under this article which, in his opinion, should be applied in order to properly determine the net income of any corporation or unincorporated business subject to tax under this article."

Regulations Promulgated by the Commissioners of the District of Columbia Involved

The Commissioners of the District of Columbia, following enactment of the District of Columbia Income and Franchise Tax Act of 1947, and pursuant to authority contained in that Act, adopted regulations for the purpose of providing a basis for allocation to the District of Columbia for franchise tax purposes of the net income of a corporation deriving income from sources both within and without the District of Columbia.

On August 31, 1948, the Commissioners promulgated regulations reading as follows:

"SEC. 10-2. The measure of the franchise tax shall be that portion of the net income of a corpo-

ration or unincorporated business as is fairly attributable to any trade or business carried on or engaged in within the District, as defined in the Act, and such other net income as is derived from sources within the District. The portion of such net income which is 'fairly attributable' to any trade or business or such other net income as is derived from sources within the District shall be determined by allocation and apportionment thereof as prescribed in Sections 10-2(b), 10-2(c), 10-2(d), 10-2(e)."

• • • • • • •

"SEC. 10-2(b). The word 'allocated' as hereinafter used in reference to income and deductions therefrom means a determination based upon actual figures specifically applicable thereto; and the word 'apportioned' so used means a ratable portion determined on a percentage basis. If the entire gross income is derived from engaging in a trade or business within the District or from sources within the District, all of such income shall be allocated to the District. If the gross income is derived from engaging in a trade or business partly within and partly without the District or from sources both within and without the District, such gross income shall be allocated and apportioned in accordance with the specific provisions or formulae prescribed in these regulations."

• • • • • • •

"SEC. 10-2(d). *Income from Trade or Business.* If the trade or business is carried on entirely within the District, the entire gross income from trade or business shall be allocated to the District. If the trade or business is carried on partly within and partly without the District, that portion of the gross income from trade or business to be apportioned to the District shall be determined as follows:

"(1) *Income from sales of tangible personal property.*

"a. Where gross income for any taxable year is derived from the manufacture and sale or pur-

chase and sale of tangible personal property, the portion thereof to be apportioned to the District shall be such percentage of the total of such gross income as the District sales made during such taxable year bear to the total sales made everywhere during such taxable year. For the purpose of this regulation the phrase 'District sales' shall mean the gross receipts from all sales made which were principally secured, negotiated, or effected by owners, employees, agents, officers and branches of the corporation or unincorporated business located in the District; and the phrase 'total sales' shall mean the gross receipts from all sales."

The foregoing regulations promulgated August 31, 1948, contained the following provision:

> "SEC. 17. *Effective date of Amendments.* The amendments made by these regulations shall apply to the taxable year or part thereof beginning on the first day of January, 1948, and to succeeding taxable years."

On March 17, 1953, the Commissioners of the District of Columbia amended Section 10-2(d)(1)a of the regulations to provide as follows:

> "SEC. 10-2(d)(1)a. Where gross income for any taxable year is derived from the manufacture and sale or purchase and sale of tangible personal property, the portion thereof to be apportioned to the District shall be such percentage of the total of such gross income as the District sales made during such taxable year bear to the total sales made everywhere during such taxable year. For the purpose of this regulation the phrase 'District sales' shall mean the gross receipts from all sales made which were principally secured, negotiated, or effected by owners, employees, agents, officers and branches of the corporation or

unincorporated business in the District; and the phrase 'total sales' shall mean the gross receipts from all sales."

On August 6, 1953, the Commissioners further amended the regulations applicable to income and franchise taxes. Section 10-2 of these regulations, as amended on August 6, 1953, provided as follows:

"SEC. 10-2. The measure of the franchise tax shall be that portion of the net income of the corporation and unincorporated business as is fairly attributable to any trade or business carried on or engaged in within the District, as defined in the Act, and such other net income as is derived from sources within the District. The portion of such net income which is 'fairly attributable' to any trade or business or such other net income as is derived from sources within the District shall be determined by allocation and apportionment thereof as prescribed in Secs. 10-2(b), 10-2(d), 10-2(e)."

Section 10-2(b) of the regulations was amended to read as follows:

"SEC. 10-2(b). The word 'allocated' as hereinafter used in reference to income and deductions therefrom means a determination based upon actual figures specifically applicable thereto; and the word 'apportioned' as hereinafter used in reference to net income means a ratable portion determined on a percentage basis. If the entire net income is derived from engaging in a trade or business within the District or from sources within the District, all of such income shall be allocated to the District. If the net income is derived from engaging in a trade or business partly within and partly without the District or from sources both within or without the District,

such income shall be allocated and apportioned in accordance with the specific provisions or formulae prescribed in these regulations."

Section 10-2(d)(1)a of the regulations was amended to read as follows:

"SEC. 10-2(d). If the trade or business is carried on or engaged in wholly within the District, the entire net income from trade or business shall be allocated to the District. If the trade or business is carried on partly within and partly without the District, that portion of the net income from trade or business to be apportioned to the District shall be determined as follows:

"(1) Income from sales of tangible personal property.

"(a) Where income for any taxable year is derived from the manufacture and sale or purchase and sale of tangible personal property, the portion thereof to be apportioned to the District shall be such percentage of the total of such income as the District sales made during such taxable year bear to the total sales made everywhere during such taxable year. Every corporation and unincorporated business which carries on or engages in business in the District within the meaning of the words 'trade or business' as defined in the Act is, unless specifically exempted by some provision of the Act, subject to tax. For the purpose of this regulation, the phrase 'District sales' shall mean all sales to District customers the income from which is fairly attributable to the trade or business carried on or engaged in within the District, including solicitation in the District by salesmen or other representatives of the taxpayer, that portion of sales to customers outside the District the income from which is fairly attributable to the trade or business carried on in the District, and sales of tangible personal property the income from which is from District sources."

By Section 15 of the amendments of August 6, 1953, the effective date of those amendments was prescribed as follows:

> "Section 15. *Effective Date of Amendments.* The amendments made by these regulations shall apply to the taxable year or part thereof beginning on the first day of January, 1948, and to succeeding taxable years."

APPENDIX C

REPORT OF THE COMMITTEE ON THE DISTRICT OF COLUMBIA, UNITED STATES SENATE, ACCOMPANYING S.2409, ENACTED AS THE ACT OF May 3, 1948, 62 Stat. 206, ch. 246, AMENDING THE DISTRICT OF COLUMBIA INCOME AND FRANCHISE TAX ACT OF 1947, 61 Stat. 328, ch. 258 (Senate Report No. 1042, 80th Congress, 2d Session).

"The Committee on the District of Columbia, to whom was referred the bill (S. 2409) to amend an act entitled 'An act to provide revenue for the District of Columbia, and for other purposes,' approved July 16, 1947, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

"The purpose of the bill is to clarify and limit the imposition of a tax upon the income of corporations or businesses which is 'derived from sources within the District of Columbia.' Due to the language appearing in the existing District of Columbia income-tax law, the imposition or assessment of the income tax was heretofore made against concerns casually engaged in business within the borders of the District of Columbia by such means as telephone, mail orders, traveling salesmen, and other nonconsistent means of solicitation. This bill will correct such situation, and limit the imposition of an income tax to those concerns factually engaged in business on their own account or through representatives or agents within the District of Columbia."

REPORT OF THE COMMITTEE ON THE DISTRICT OF COLUMBIA, UNITED STATES HOUSE OF REPRESENTATIVES, ACCOMPANYING S. 2409, ENACTED AS THE ACT OF May 3, 1948, 62 Stat. 206, ch. 246, AMENDING THE DISTRICT OF COLUMBIA INCOME AND FRANCHISE TAX ACT OF 1947, 61 Stat. 328, ch. 258 (House Report No. 1792, 80th Congress, 2d Session).

"The Committee on the District of Columbia, to whom was referred the bill (S. 2409) to amend an act entitled 'An act to provide revenue for the District of Columbia, and for other purposes,' approved July 16, 1947, having considered the same, report favorably thereon with amendments and recommend that the bill as amended do pass.

"The amendments are as follows:

"Strike all but enacting clause and insert the following:

"That paragraph lettered (h) of section 4 of title I of article I of the Act entitled 'An Act to provide revenue for the District of Columbia, and for other purposes', approved July 16, 1947, is amended by striking out the period at the end of the paragraph, inserting a colon, and the following: '*Provided, however*, That the words "trade or business" shall not include, for the purposes of this article—

"(1) Sales of tangible personal property whereby title to such property passes within or without the District, by a corporation or unincorporated business which does not physically have or maintain an office, warehouse, or other place of business in the District, and which has no officer, agent, or representative having an office or other place of business in the District, during the taxable year; or

"(2) Sales of tangible personal property by a corporation or unincorporated business which does not maintain an office or other place of business in the District and which has no office, agent,

or representative in the District except for the sole purpose of doing business with the United States, but such corporations and unincorporated businesses shall be subject to the licensing provisions in title XIV of this article.

"For purposes of this proviso, the words 'agent' or 'representative' shall not include any independent broker engaged independently in regularly soliciting orders in the District for sellers and who holds himself out as such.

"SEC. 2. Section 1 of title X of article I of said Act is amended by striking out the period at the end of the section, inserting a colon, and the following: 'Provided further, That income derived from the sale of tangible personal property by a corporation or unincorporated business not carrying on or engaging in trade or business within the District as defined in title I of this article shall not be considered as income from sources within the District for purposes of this article, with the exception of income from sales to the United States not excluded from gross income as provided in title III, section 2(b) (13) of this article.'

"SEC. 3. Paragraph lettered (b) of section 2 of title III of article I of said Act is amended by adding thereto the following subparagraph:

'(13) Income derived from the sale of tangible personal property to the United States by corporations and unincorporated businesses having their principal places of business located outside the District, which property is delivered from places outside the District for use outside the District: *Provided, however,* That the taxpayer shall furnish to the Assessor a statement in writing of the amount of gross sales so made and, if required by the Assessor, a list of the names of the agencies of the United States through which such property was sold.'

"SEC. 4. Section 4 of title XIV of article I of said Act is repealed.

"SEC. 5. The amendments made by this Act shall apply to the taxable year or part thereof

beginning on the 1st day of January 1948, and to succeeding taxable years.

"The purpose of the bill, as amended, is to clarify the language and intent in the District of Columbia Income and Franchise Tax Act of 1947, in order that the tax so provided be not imposed on corporations and unincorporated businesses which do not maintain places of business or representatives in the District of Columbia, or on such concerns which maintain places of business or representatives in the District for the sole purpose of doing business with the United States, in respect to sales of tangible personal property delivered outside the District for use outside the District.

"Complaints were received by Members of the Congress from business organizations located outside the District which did business in the District through solicitation by salesmen and others who did not maintain business offices in the District. As a result of such complaints, H. R. 5317 and H. R. 5563, Eightieth Congress, Second session, were introduced. Those bills were intended to amend the 1947 act to exempt from taxation income derived from the procurement of orders for the sale of personal property by means of telephonic communication, correspondence, or solicitation by salesmen in the District where such orders required acceptance without the District before binding the parties and title to such property passed without the District, as well as the income derived from sales of personal property to the United States unless the taxpayer was engaged in business in the District and such property was delivered for use within the District. The language of H. R 5317 and H. R. 5563 was the same as that contained in section 1 of the act of June 22, 1942 (56 Stat. 376, title 47, sec. 1502(b), D.C. Code 1940, supp. V), which amended the District of Columbia Income Tax Act of 1939. Those bills met with opposition by District tax officials because, in their view, the prior law on which the two bills were based resulted in inequit-

able taxation and much administrative difficulty and litigation.

"Hearings on the subject were held before the Joint Subcommittee on Fiscal Affairs of the Committees on the District of Columbia, and, thereafter, conferences were held by District tax officials and some of the interested representatives of manufacturing organizations in efforts to formulate amendments to the 1947 act which would be satisfactory to the complaining taxpayers and alleviate the difficulties of the tax officials. As a result of the hearings and conference, bill H. R. 6050 and companion bill S. 2409 were introduced. Subsequently on April 12, 1948, the bill (S. 2409) was passed by the Senate and referred to the House Committee on the District of Columbia.

"Representatives of the Navy Department of the United States and a corporation doing business with the United States suggested amendments with respect to sales of tangible personal property to the United States which property is delivered from places outside the District for use outside the District, when the selling corporations or unincorporated businesses do not have their principal places of business in the District. Additional conferences were held by District tax officials and interested representatives of the United States and others, as indicated above, and the amendments with respect to sales made to the United States, which this committee recommends, were agreed upon. * * *."

Office - Supreme Court, U. S.
FILED
JUN 6 1956
HAROLD B. WILLEY, Clerk

No. [redacted]152

JOINT APPENDIX

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12,927

United States Court of Appeals
For the
District of Columbia Circuit
FILED NOV 30 1955
Joseph W. Stewart
CLERK

DISTRICT OF COLUMBIA, *Petitioner*,

v.

RADIO CORPORATION OF AMERICA, *Respondent*.

ON PETITION FOR REVIEW OF A DECISION OF THE DISTRICT OF COLUMBIA TAX COURT

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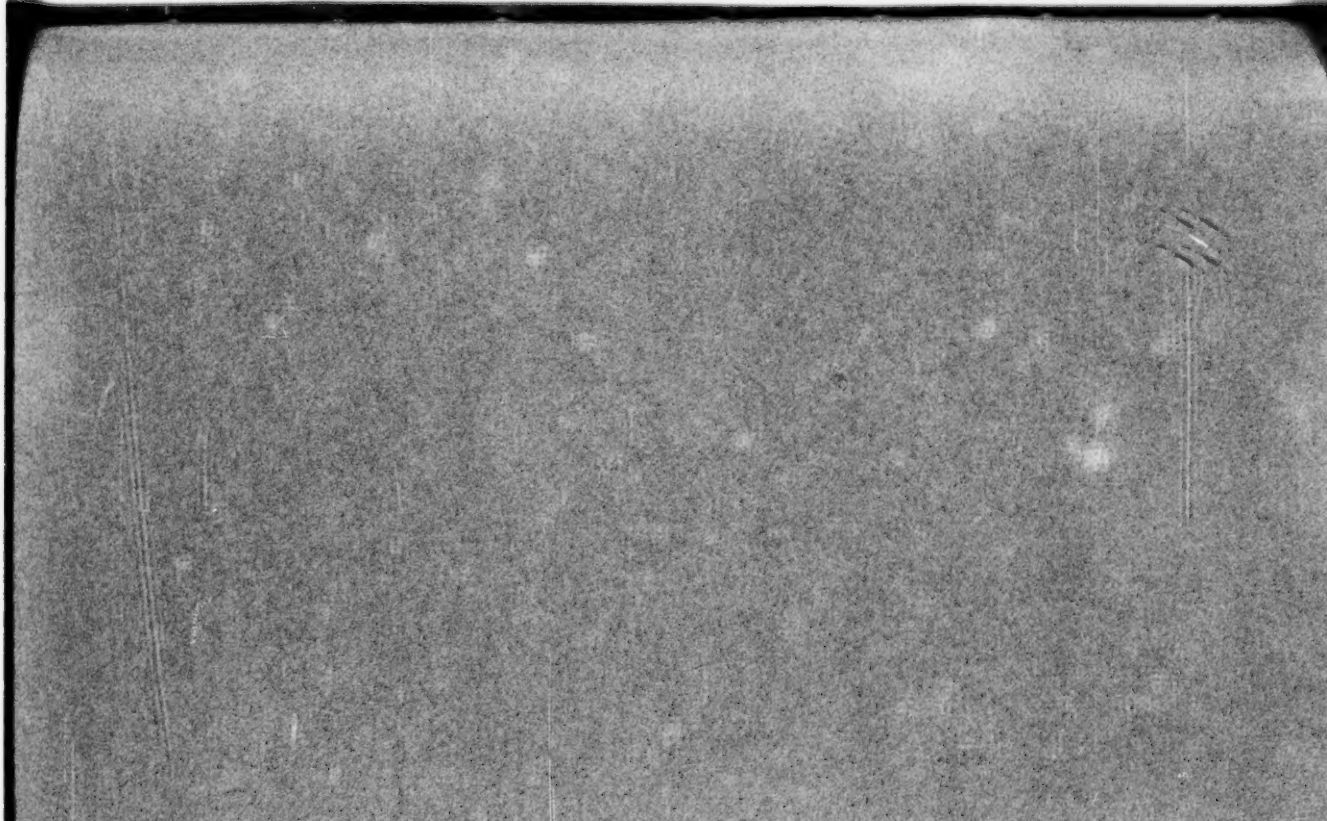

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19 FILED JUN 29 1955 District of Columbia Tax Court

Docket No. 1463

FINDINGS OF FACTS AND OPINION

The petitioner here seeks a reduction of an assessment of franchise taxes assessed against it for the calendar years 1949, 1950 and 1951. It claims that the Assessor erred in determining that certain sales of tangible personal property to customers in the District of Columbia were "District sales" within the meaning of pertinent regulations; and that the use of the proceeds of such sales as a factor in a formula for the apportionment of its net income by which the tax was measured was improper.

FINDINGS OF FACTS

I

In General

1. The petitioner is a Delaware corporation, with its principal office at 30 Rockefeller Plaza, New York, N. Y.

2. During the taxable years involved the domestic manufacturing and sales activities of the petitioner were conducted by four product departments, each organized as a separate business, each had its own general manager (usually a vice-president of the petitioner), chief engineer and engineering staff, financial department and sales department. Each department had its own separate manufacturing facilities and general office. The departments were

connected at the highest echelon of management only. Such departments were the Engineering Products Department, Home Instrument Department, Record Department and Tube Department.

3. *The Home Instrument Department* had its general office at Camden, New Jersey, and its manufacturing facilities at Camden, New Jersey, Indianapolis, Indiana, and Bloomington, Indiana. It manufactured and sold radio sets, television sets and phonographs. It had no office, manufacturing facilities, warehouse or stock of goods in the District of Columbia.

4. *The Record Department* had its general offices at Camden, New Jersey, with its manufacturing facilities at Indianapolis, Indiana, and for a part of the taxable period at Cannonsburg, Pennsylvania, New York, New York, and Los Angeles, California. It manufactured, sold and leased phonograph and other recording records, part of which were leased to radio broadcasting stations in the District of Columbia.

5. *The Tube Department* had its general offices at Harrison, New Jersey, and its manufacturing facilities at Lancaster, Pennsylvania, Marion, Indiana and Indianapolis, Indiana. It manufactured and sold electron tubes, tube parts, tube-making machinery and batteries. It had no manufacturing facilities, warehouse or stock of goods in the District of Columbia. It had no office in the District of Columbia during 1949, 1950 and the first four months of 1951. In May, 1951 the Tube Department opened an office at 1757 K Street, N.W., Washington, D. C. In it were employed a secretary and one representative whose duty it was to maintain liaison between the Federal Government's purchasing agencies and the management of the Tube Department.

6. *The Engineering Products Department* had its general offices at Camden, New Jersey, and its manufacturing facilities at Camden, New Jersey, Detroit, Michigan, and

Los Angeles, California. It manufactured and sold industrial electronic equipment and special apparatus for the United States Government. It had no manufacturing facilities, warehouse or stock of goods in the District of Columbia. It had an office in the Commonwealth Building, Washington, D. C., in which two other activities of the petitioner, namely, the Patent Department and the Frequency Bureau, had office space. The principal function of the Washington office of the Engineering Products Department was to maintain contact with, and to assist the Federal Government in connection with its needs for electronic equipment, chiefly with respect to military equipment such as radar, sonar and special communications devices.

7. In addition to the four products departments hereinbefore described, there were maintained and operated by the petitioner two activities, namely, Patent Department and Frequency Bureau, in the District of Columbia.

8. *The Patent Department* had its headquarters at Princeton, New Jersey. It maintained an office in the Commonwealth Building, Washington, D. C., which was a research and training office for the petitioner's patent attorneys. It consisted of nine professional employees and three secretaries. Its only connection with other departments and divisions of the petitioner was to handle patent disclosures originating therein. Its personnel had nothing to do with the sale of the petitioner's products. Its office space was used solely by its own personnel.

9. *The Frequency Bureau* was a part of the Laboratories Division of the petitioner located at Princeton, New Jersey. It had an office in the Commonwealth Building, Washington, D. C. It consisted of three professional employees and three secretaries. The function of the Frequency Bureau was to advise the petitioner and its subsidiaries on the use and assignment of frequencies granted by the Department of State, the Federal Communications Commission and the

Department of Defense, and to obtain licenses for use of frequencies. Its representatives attended all international conferences on radio frequencies. It had nothing to do with the sale of the petitioner's products and its office space was used solely by its own personnel.

10(a) The petitioner sold its products and leased its recording records to customers in the District of Columbia through its four products departments solely during the taxable years here involved and in the amounts following:

Department	1949	1950	1951
Home Instrument	$3,408,875.33	$5,282,511.93	$3,584,938.98
Record	261,529.41	308,190.87	424,864.39
Tube	440,829.70	574,767.65	724,257.98
Engineering Products	268,250.10	350,647.21	468,032.22
Total	$4,379,484.54	$6,516,117.66	$5,202,093.57

(b) In the foregoing amounts relating to the Record Department are included amounts received by that department as rental of records to radio broadcasting stations in the District of Columbia as follows: for 1949—$3,710.60, for 1950—$12,859.89 and for 1951—$16,760.00.

(c) The products sold and leased by the petitioner
22 as above set forth were shipped by common carrier; did not come into the District of Columbia through any facilities maintained by petitioner; and were not shipped on a consignment basis.

11. The petitioner filed with the Assessor within the time provided by law, corporate franchise tax returns for the three taxable years here involved, and in respect of gross and net income, the apportionment thereof and the franchise taxes due the District of Columbia reported as follows:

	1949	1950	1951
Total Gross Sales	$286,724,157.34	$452,676,201.68	$407,542,968.59
District of Columbia Sales	69,842.67	158,733.53	150,842.58
Apportionment Factor	.00024359	.000350655	.000370126
Total Net Income	37,069,963.56	90,749,804.67	40,461,785.10
District of Columbia Portion	8,751.96	31,103.74	13,953.64
Tax due District of Columbia	437.60	1,555.19	697.68

12(a) On March 11, 1954, the Assessor sent by registered mail a deficiency notice to the petitioner to the effect that he intended to assess deficiencies in franchise taxes for the taxable years here involved in accordance with the accompanying statement following:

"RADIO CORPORATION OF AMERICA
Front and Cooper Streets
Camden, New Jersey

	Calendar Years		
	1949	1950	1951
Net income subject to apportionment	$35,929,041.24	$88,701,818.59	$37,699,692.70
X apportionment factor*	.015274	.014395	.012765
Portion attributable to D. C.	$548,780.18	$1,276,862.68	$481,236.58
Tax @ 5%	$27,439.01	$63.843.13	$24,061.83
Less amount reported	437.60	1,555.19	697.68
Deficiency	$27,001.41	$62,287.94	$23,364.15

*Computation of apportionment factor:

A. Total sales all sources	$286,724,157.34	$452,676,201.68	$407,542,968.59
B. Total District sales, item 5, schedule M	4,379,484.54	6,516,117.66	5,202,093.57
C. Apportionment factor (B ÷ A)	.015274	.014395	.012765

Based on the information furnished, it is our view that the above computations reflect the net income fairly attributable to business carried on within the District of Columbia."

(b) The statement of net income of the petitioner subject to apportionment in the foregoing computation by the Assessor was correct.

13(a) On September 21, 1954, the Assessor assessed the petitioner deficiencies in franchise taxes, plus interest, for the taxable years here involved as follows:

Year	*Tax*	*Interest*	*Total*
1949	$27,001.41	$7,182.38	$34,183.79
1950	62,287.94	12,831.32	75,119.26
1951	23,364.15	3,411.17	26,775.32
Total	$112,653.50	$23,424.87	$136,078.37

(b) On October 5, 1954, the petitioner paid such taxes to the Collector of Taxes.

(c) In its amended petition the petitioner alleged that the taxes and interest in controversy are as follows:

Year	*Tax*	*Interest*	*Total*
1949	$26,373.22	$ 7,015.28	$33,388.50
1950	61,452.71	12,659.26	74,111.97
1951	21,876.07	3,193.91	25,069.98
Total	$109,702.00	$22,868.45	$132,570.45

(d) In its amended petition the petitioner conceded that during the taxable years it had "District Sales" as meant by the pertinent regulations as follows:

	1949	1950	1951
Total District Sales	$140,479.34	$178,150.06	$291,595.83

(e) In its amended petition the petitioner conceded that it owed to the District of Columbia the deficiencies in franchise taxes following:

Year	*Tax*	*Interest*	*Total*
1949	$ 628.19	$167.10	$ 795.29
1950	835.23	172.06	1,007.29
1951	1,488.08	217.26	1,705.34
Total	$2,951.50	$556.42	$3,507.92

14. This proceeding was filed on December 17, 1954.

II

Home Instrument Department Sales

15. Sales of products of the Home Instrument Department, namely, television and radio sets and phonographs, to customers in the District of Columbia were to the customers, for the years and in the amounts following:

Customer	1949	1950	1951
Southern Wholesalers, Inc.	$3,330,918.18	$5,184,251.96	$3,538,464.63
Fairfax Distributing Co., Inc.	59,677.25	67,315.17	28,541.81
RCA Affiliated Cos.	6,671.71	18,603.77	10,404.89
Other Customers	11,608.19	12,341.03	7,068.61
U. S. Government			459.04
Total	$3,408,875.33	$5,282,511.93	$3,584,938.98

16(a) *Southern Wholesalers, Inc.*, was a wholesale distributor of sundry articles with its office at 707 Edgewood Street, N. E., Washington, D. C. It was a wholesale
24 distributor of the products of the Home Instrument Department, of the products of other departments of the petitioner and of the products of manufacturers other than the petitioner, such as refrigerators, ranges and washing machines. It was appointed by a letter from RCA Victor Company, Inc., dated January 15, 1934, and reading as follows:

> "Mr. William E. O'Connor, President,
> Southern Wholesalers, Inc.,
> 1519-21 L Street, N. W.,
> Washington, D. C.
> Dear Mr. O'Connor:
>
> We take pleasure in extending to you an appointment as of this date, and until further notice, as a Distributor for RCA Victor products.
>
> We suggest and recommend that you confine your sales of RCA Victor products to the territory which is outlined on the attached map.
>
> We are looking forward with pleasure to our future relations.
>
> Very truly yours,
>
> M. F. Burns, Merchandising Manager,
> Radio and Phonograph Division."

RCA Victor Company, Inc., was a subsidiary of the petitioner, and its home instrument business was operated by the Home Instrument Department during the taxable years. Among the products covered by the aforesaid letter were radio receivers and phonographs.

(b) In its dealings with Southern Wholesalers, Inc., the Home Instrument Department followed the Distributors Quarterly Acceptance system of selling, hereinafter referred to as "DQA." Each quarter of the year the Department determined the percentage of the total factory output which it was felt should reasonably be handled or moved by Southern Wholesalers, Inc. The field sales representative of the Home Instrument Department then began negotiations with Southern Wholesalers, Inc., for the acceptance by the latter of the responsibility to move the quota of products allotted to it. If the quantities suggested or allotted were not satisfactory changes mutually satisfactory were made. As the merchandise was produced Southern Wholesalers, Inc., was notified as to what was scheduled for shipment in that particular week. In the absence of any objection from Southern Wholesalers, Inc., the merchandise was shipped and billed in the ordinary course of business. Southern Wholesalers, Inc., could have refused shipment at any time prior to the time of actual shipment. The DQA for the first and third quarters of the year were negotiated in Camden, New Jersey, and for the second and fourth quarters in Washington, D. C. Supplemental DQA's were in most instances negotiated by telephone from Philadelphia, Pennsylvania or Camden, New Jersey.

(c) The field sales representative of the Home Instrument Department who represented the Department in its dealings with Southern Wholesalers, Inc., resided in Philadelphia and had his office in Camden, New Jersey. His territory comprised Eastern Pennsylvania, Southern New Jersey, Delaware, Maryland, District of Columbia and a part of Virginia. He was compensated by salary and received no sales commissions. He visited the Southern Wholesalers, Inc., about twelve times each year. On such visits he advised Southern Wholesalers, Inc., in the merchandising of the products of the Department, and discussed

such matters as the movement of merchandise, advertising, sales promotion programs, and sales training of personnel. He did not take orders for merchandise on his visits to Southern Wholesalers, Inc., or from any other customer in the District of Columbia. He did not enter into any agreement for the sale of merchandise to Southern Wholesalers, except the negotiation of the DQA. He did not use any of the offices of the petitioner in the District of Columbia.

(d) The Home Instrument Department made available to Southern Wholesalers, Inc., a cooperative advertising fund used for sales promotional purposes by the latter. The fund was made up of equal contributions by both parties. Advertisements for which payment was made out of the cooperative fund were run over the name of Southern Wholesalers, Inc., or the names of retail dealers offering the products of the Home Instrument Department for sale.

(e) Several times during the taxable years involved James H. Hickey, Assistant to the General Manager of the Home Instrument Department, who resided in Collingswood, New Jersey, and whose office was in Camden, New Jersey, came to the District of Columbia to attend meetings or gatherings promoted by Southern Wholesalers, Inc., or in which that company was interested, such as dinners
26 given by that company to important officers of a customer, anniversary parties given by large department stores, other social gatherings and "pep" meetings of salesmen. On some, if not all of such occasions, Mr. Hickey was accompanied by the field sales representative. The purpose of attending such meetings and gatherings was to create good will and enthusiasm for the products of the Home Instrument Department, and no orders for merchandise were taken thereat.

(f) Sales of products of the Home Instrument Department to Southern Wholesalers, Inc., were f.o.b. factory. Shipments from first to the middle of the month were due for payment by the end of the month, and shipments from

the middle to the end of the month were due for payment in the middle of the following month.

17(a) *Fairfax Distributing Company,* hereinafter called "Fairfax" was a distributor of the products of the Home Instrument Department. It was formerly known as "E. M. Rosenthal Jewelry Company," and was the purchasing organization or agency for an affiliated group of retail jewelry stores. The individual stores placed their orders for the petitioner's products through Fairfax as needed. It did not carry an inventory of goods, and did not purchase merchandise under the DQA system. It sold television and radio receivers manufactured by competitors of the petitioner. It was appointed distributor by letter, dated December 27, 1939, reading as follows:

> "E. M. Rosenthal Jewelry Company
> Homer Building
> Washington, D. C.
>
> Gentlemen:
>
> We are pleased to appoint you a Distributor of RCA Victor Instruments. In making this appointment, we suggest and recommend that you confine your sales of our products to your present list of dealers and other similar dealers that you may line up in the future.
>
> In accepting this appointment as our distributor, you do so with the understanding that it is subject to all of the terms and conditions of the sales and merchandising policies of the Company as it now exists, or as it may hereafter be changed at any time without notice.
>
> We recognize your right to discontinue handling our products at any time without notice, and we reserve the right to cancel your appointment as our

Distributor, or to change prices or discounts without notice to you.

It is our desire to cooperate fully with you and we will be glad to discuss any problems that may confront you in the merchandising and sale of our products at any time.

27 With best wishes for maximum success, we are

Cordially yours,
RCA MANUFACTURING COMPANY, INC.
J. B. Elliott
Field Organization Headquarters."

(b) The Fairfax account was handled or carried on by the Assistant to the General Manager of the Home Instrument Department, whose home and office were without the District of Columbia. He came to the District of Columbia two or three times each of the taxable years to call on Fairfax. Such were "prestige", or "good will" calls to promote the sale of the products of the Home Instrument Department. He never took an order for merchandise and did not visit any retail dealers. He did not use the office facilities of the petitioner in the District of Columbia.

18. *Affiliated Companies* to whom products of the Home Instrument Department were sold were affiliates or subsidiaries of the petitioner in the District of Columbia, such as the National Broadcasting Company or another department of the petitioner, such as the Engineering Products Department and Tube Department. The merchandise was shipped into the District of Columbia and billed to the affiliated companies. Orders for such merchandise were not procured by any representative of the petitioner.

19. *Other Customers* represented customers in the District of Columbia other than Southern Wholesalers, Inc., Fairfax Distributing Co., affiliated companies and the

United States Government. Sales represented merchandise shipped to other customers in the District of Columbia. Orders for such merchandise were not procured by any representative of the petitioner.

20. Neither the Home Instrument Department nor any employee of that Department maintained an office in the District of Columbia. No employee of that Department resided in the District of Columbia.

21. No employee of the petitioner other than employees of the Home Instrument Department had any duty or responsibility regarding sales of its products; and no sales of its products were negotiated or made by any non-Home Instrument Department employee.

22. None of the petitioner's sales of the products of the Home Instrument Department to customers in the
28 District were principally secured, negotiated or effected by employees, agents, officers or branches of petitioner located in the District of Columbia.

23. The petitioner conceded that the amount of gross income of $459.04 from sales of products of the Home Instrument Department to the United States Government and shipped into the District of Columbia was from sources within the District of Columbia.

III

Record Department Sales

24(a) The receipts of the Record Department from the sale and rental of RCA Victor records to customers in the District of Columbia were as follows:

	1949	1950	1951
Sales	$257,818.81	$295,330.98	$408,104.39
Rental	3,710.60	12,859.89	16,760.00
Total	$261,529.41	$308,190.87	$424,864.39

(b) Sales of RCA Victor records by the Record Department were made to one customer only, namely, Southern Wholesalers, Inc.

25(a) Southern Wholesalers, Inc., is described in Findings of Fact 16(a), which by reference is incorporated herein. It was appointed a distributor of RCA Victor records by a letter dated January 15, 1934, quoted in full in that findings of fact.

(b) The records sold to Southern Wholesalers, Inc., were sold f.o.b. Washington, D. C. No records were sold in consignment. Orders by Southern Wholesalers, Inc., for records were subject to acceptance at the office of the Record Department without the District of Columbia.

(c) The field sales representative of the Record Department who handled the account of Southern Wholesalers, Inc., and who had dealings therewith resided, and had his office without the District of Columbia. His operative territory was Eastern Pennsylvania, Southern New Jersey, parts of Delaware, of Maryland, of Virginia and of West Virginia, and the District of Columbia. He was the only field sales representative of the Record Department in that area. He worked out of the headquarters of the Record Department in Camden, New Jersey, and later out of New York, N. Y. He had nothing to do with the sale of products of the other departments of the petitioner. No representa-
29 tive or other employee of the Record Department resided, or had an office in the District of Columbia.

(d) The field sales representative came to Washington about once every three weeks. He did not make use of the office facilities of the petitioner in the District of Columbia. He did not receive or accept orders in the District of Columbia. All orders went directly to the Headquarters of the Record Department in Camden, New Jersey. On such trips he visited Southern Wholesalers, Inc. He reviewed the personnel of that company any then current matters regarding the promotion of sales and advertising campaigns. He investigated whether that company was "servicing" its customer's orders promptly and suggested promotion of advertising. He made suggestions concerning such matters,

which sometimes were followed and sometimes not, in which latter event nothing happened and no threat of any kind was made. The field representative made calls on retail dealers, radio broadcasting stations in company with the salesmen or the record manager of Southern Wholesalers, Inc.

(e) The Record Department had a cooperative advertising fund with Southern Wholesalers, Inc., similar to that fund which the Home Instrument Department had with the latter, and described in Findings of Fact 16(d).

(f) None of the petitioner's sales of RCA Victor records by the Record Department to Southern Wholesalers, Inc., were principally secured, negotiated or effected by an employee, agent, officer or branch of the petitioner in the District of Columbia.

26. *Leasing of Records.* The petitioner conceded that the gross income represented by rentals received from the leasing of records to customers or lessees in the District of Columbia, as set forth in Findings of Fact 24(a), was from sources within the District of Columbia.

IV

Tube Department Sales

27. The Tube Department manufactured and sold radio receiving tubes, power tubes, tubes for television, transisters, batteries, component parts and accessories. Sales of such products were under the jurisdiction or management of two units or organizations within the Tube Department, namely, Equipment Sales and Renewal Sales.The Equipment Sales personnel handled sales to manufacturers of radio and television equipment and to the United States Government. The Renewal Sales personnel handled sales to distributors, radio stations and other types of customers.

28. Sales of products of the Tube Department to its various classes of customers located in the District of Columbia were as follows:

	1949	1950	1951
Franchised distributors	$ 51,798.74	$127,338.72	$192,183.47
Other distributors[1]	213,476.95	193,444.99	213,864.12
Radio stations	71,351.71	6,664.28	4,492.61
Manufacturers	22,976.91	87,127.41	75,736.80
Affiliated Companies	40,289.40	69,563.62	38,893.08
Miscellaneous	5,014.63	1,903.71	1,144.37
U. S. Government	35,921.36	89,724.92	197,943.53
Total	$440,829.70	$574,767.65	$724,257.98

29. The distributors of the products of the Tube Department in the District of Columbia were Southern Wholesalers, Inc., Capitol Radio Wholesalers, Inc., Rucker Radio Wholesalers, Inc., and American Amplifier and Television Corporation.

30. *Southern Wholesalers, Inc.*, was appointed distributor of tubes and batteries by the letters following:

"

March 18, 1936

Southern Wholesalers, Inc.
1519 L Street, N. W.
Washington, D. C.

Gentlemen:

We are pleased to appoint you as a distributor of RCA Transmitting Tubes and Amateur Equipment.

In accepting this appointment as our Distributor you do so with the understanding that it is subject to all of the terms and conditions of the sales and merchandising policy of the Company as it now exists, or as it may hereafter be changed at any time without notice.

[1] The above information appears on Petitioner's Exhibit 2. The record does not disclose the difference, if any, between "Franchised distributors" and "Other distributors."

In appointing you as our Distributor we recognize your right to discontinue handling our products at any time without notice, and we reserve the right to cancel your appointment as our Distributor, appoint additional outlets or to change prices or discounts without notice to you.

It is our desire to cooperate fully with you and we will be glad to discuss any problems that may confront you in the merchandising and sale of our product at any time.

With best wishes for success, we are,

Very truly yours,
RCA MANUFACTURING CO., INC.
R. A. Forbes,
District Manager"

* * * * * * * * * *

31 " May 20, 1938

Southern Wholesalers, Inc.
1519 L Street, N. W.
Washington, D. C.

Gentlemen:

We are pleased to appoint you a wholesale distributor of RCA Victor Radio Tubes. In making this appointment, we suggest and recommend that you confine your sales of RCA Victor Radio Tubes to the identical territory which you serve with RCA Victor instruments.

In accepting this appointment as our Distributor you do so with the understanding that it is subject to all of the terms and conditions of the sales and merchandising policy of the Company as it now exists, or as it may hereafter be changed at any time without notice.

We recognize your right to discontinue handling our products at any time without notice, and we reserve the right to cancel your appointment as our Distributor, or to change prices or discounts without notice to you.

It is our desire to cooperate fully with you and we will be glad to discuss any problems that may confront you in the merchandising and sale of our product at any time.

With best wishes for success, we are

Very truly yours,
RCA MANUFACTURING COMPANY, INC.
District Manager"

. . . . . .

"

June 13, 1945

Mr. Wm. E. O'Connor
Southern Wholesalers, Inc.
1519 L St., N. W.
Washington, D. C.

Dear Mr. O'Connor:

We are pleased to appoint you a Distributor of RCA Batteries.

In accepting this appointment as our Distributor, you do so with the understanding that it is subject to all of the terms and conditions of the sales and merchandising policy of the Company as it now exists, or as it may hereafter be changed at any time without notice.

We recognize your right to discontinue handling our products at any time without notice, and we reserve the right to cancel your appointment as our Distributor, or to change prices or discounts without notice to you.

You will receive very shortly from the home office at Camden, complete policy, price, promotion and advertising information which will assist you in merchandising the product listed above.

It is our desire to cooperate fully with you and we will be glad to discuss any problems that may confront you in the merchandising and sale of our product at any time.

32 With best wishes for success, we are,

Very truly yours,
RADIO CORPORATION OF AMERICA
RCA Victor Division
J. G. Wilson
Operating Vice President"

31. *Capitol Radio Wholesalers, Inc.*, was appointed distributor of tubes and batteries and laboratory measuring equipment by the letters following:

"August 30, 1937

Capitol Radio Wholesalers
2120-14th Street, N. W.
Washington, D. C.

Gentlemen:

We are pleased to appoint you as a distributor of Cunningham Tubes.

In accepting this appointment as our Distributor you do so with the understanding that it is subject to all of the terms and conditions of the sales and merchandising policy of the Company as it now exists, or as it may hereafter be changed at any 33
time without notice.

In appointing you as our Distributor we recognize your right to discontinue handling our products at any time without notice, and we reserve the right

to cancel your appointment as our Distributor, appoint additional outlets or to change prices or discounts without notice to you.

It is our desire to cooperate fully with you and we will be glad to discuss any problems that may confront you in the merchandising and sale of our product at any time.
With best wishes for success, we are

Very truly yours,
W. H. Kelley,
District Manager."

* * * * * * * * * *

" November 12, 1946

Capitol Radio Wholesalers, Inc.
2120 Fourteenth Street, N. W.
Washington, D. C.

Gentlemen:

We are pleased to appoint you a Distributor of RCA Batteries.
In accepting this appointment as our Distributor, you do so with the understanding that it is subject to all of the terms and conditions of the sales and merchandising policy of the Company as it now exists, or as it may hereafter be changed at any time without notice.

We recognize your right to discontinue handling our product at any time without notice, and we reserve the right to cancel your appointment as our Distributor, appoint additional outlets, or change prices or discounts without notice to you.

You will receive very shortly from the home office, complete policy, price, promotion and advertising

information which will assist you in merchandising RCA Batteries.

It is our desire to cooperate fully with you and we will be glad to discuss any problems that may confront you in the merchandising and sale of our product at any time.

With best wishes for success, we are

Very truly yours,
RADIO CORPORATION OF AMERICA
(RCA VICTOR DIVISION)
Walter M. Norton
Director of Distribution"

• • • • • • • • • • •

" January 27, 1947

Capitol Radio Wholesalers, Inc.
2120 Fourteenth Street, N. W.
Washington, D. C.

Gentlemen:

We are pleased to appoint you a Distributor of RCA Laboratory Measuring Equipment.

In accepting this appointment as our Distributor, you do so with the understanding that it is subject to all of the terms and conditions of the sales and merchandising policy of the Company as it now exists, or as it may hereafter be changed at any time without notice.

We recognize your right to discontinue handling our product at any time without notice, and we reserve the right to cancel your appointment as our Distributor, appoint additional outlets, or to change prices or discounts without notice to you.

You will receive very shortly from the home office, complete policy, price, promotion and advertising information which will assist you in merchandising Laboratory Measuring Equipment.

It is our desire to cooperate fully with you and we will be glad to discuss any problems that may confront you in the merchandising and sale of our product at any time.

With best wishes for success, we are

Very truly yours,
RADIO CORPORATION OF AMERICA
(RCA VICTOR DIVISION)
Walter M. Norton
Director of Distribution"

32. *Rucker Radio Wholesalers, Inc.*, was appointed distributor of tubes, batteries, amateur equipment and laboratory measuring equipment by the letters following:

34 " October 26, 1939

Rucker Radio Wholesalers, Inc.
1220 14th Street, N. W.
Washington, D. C.

Gentlemen:

We are pleased to appoint you as a distributor of RCA Parts.

In accepting this appointment as our Distributor you do so with the understanding that it is subject to all of the terms and conditions of the sales and merchandising policy of the Company as it now exists, or as it may hereafter be changed at any time without notice.

In appointing you as our Distributor we recognize your right to discontinue handling our products

at any time without notice, and we reserve the right to cancel your appointment as our Distributor, appoint additional outlets or to change prices or discounts without notice to you.

It is our desire to cooperate fully with you and we will be glad to discuss any problems that may confront you in the merchandising and sale of our product at any time.

With best wishes for success, we are

Very truly yours,
RCA MANUFACTURING CO., INC.
W. H. Kelley
District Manager"

* * * * * * * * * * *

"December 20, 1939

Rucker Radio Wholesalers, Inc.
1220 Fourteenth Street, N. W.
Washington, D. C.

Gentlemen:

We are pleased to appoint you as a distributor of RCA Radiotron Receiving Tubes.

In accepting this appointment as our distributor you do so with the understanding that it is subject to all of the terms and conditions of the sales and merchandising policy of the Company as it now exists, or as it may hereafter be changed at any time without notice.

In appointing you as our Distributor we recognize your right to discontinue handling our products at any time without notice, and we reserve the right to cancel your appointment as our Distributor, appoint additional outlets or to change prices or discounts without notice to you.

It is our desire to cooperate fully with you and we will be glad to discuss any problems that may confront you in the merchandising and sale of our product at any time.

With best wishes for success, we are

Very truly yours,
RCA MANUFACTURING CO., INC.
W. H. Kelley
District Manager"

35 " January 21, 1941

Rucker Radio Wholesalers, Inc.
1312-14th Street, N. W.
Washington, D. C.

Gentlemen:

We are pleased to appoint you as a distributor of RCA Transmitting Tubes and Amateur Equipment.

In accepting this appointment as our Distributor you do so with the understanding that it is subject to all of the terms and conditions of the sales and merchandising policy of the Company as it now exists, or as it may hereafter be changed at any time without notice.

In appointing you as our Distributor we recognize your right to discontinue handling our products at any time without notice, and we reserve the right to cancel your appointment as our Distributor, appoint additional outlets or to change prices or discounts without notice to you.

It is our desire to cooperate fully with you and we will be glad to discuss any problems that may con-

front you in the merchandising and sale of our product at any time.

With best wishes for success, we are

Very truly yours,
RCA MANUFACTURING COMPANY, INC.
M. F. Blakeslee
District Manager"

* * * * * * * * * * *

" March 10, 1949

Rucker Radio Wholesalers,
1312 - Fourteenth St., N. W.
Washington, D. C.

Gentlemen:

Effective as of the above date, we are pleased to appoint you a Distributor for RCA Batteries and Laboratory Measuring Equipment.

In accepting this appointment as our Distributor, you do so with the understanding that it is subject to all of the terms and conditions of the sales and merchandising policy of the Company as it now exists, or as it may hereafter be changed at any time without notice.

We recognize your right to discontinue handling our products at any time without notice, and we reserve the right to cancel your appointment as our Distributor, appoint additional outlets, or to change prices or discounts without notice to you.

You will receive very shortly from the home office, complete policy, price, promotion and advertising information which will assist you in merchandising the products mentioned above.

It is our desire to cooperate fully with you and we shall be glad to discuss any problems that may confront you in the merchandising and sale of our products at any time.

With best wishes for success, we are

Very truly yours,
RADIO CORPORATION OF AMERICA
(RCA VICTOR DIVISION)
H. M. Winters"

36 33. *American Amplifier and Television Corporation*, was appointed distributor of tubes by the letter dated December 2, 1940, reading as follows:

"American Amplifier & Television Corp.
1427 Eye Street, N. W.
Washington, D. C.

Gentlemen:

We are pleased to appoint you as a distributor of RCA Radiotron Receiving Tubes.

In accepting this appointment as our Distributor you do so with the understanding that it is subject to all of the terms and conditions of the sales and merchandising policy of the Company as it now exists, or as it may hereafter be changed at any time without notice.

In appointing you as our Distributor we recognize your right to discontinue handling our products at any time without notice, and we reserve the right to cancel your appointment as our Distributor, appoint additional outlets or to change prices or discounts without notice to you.

It is our desire to cooperate fully with you and we will be glad to discuss any problems that may con-

front you in the merchandising and sale of our product at any time.

With best wishes for success, we are

Very truly yours,
RCA MANUFACTURING COMPANY, INC.
M. F. Blakeslee
District Manager"

34. One Renewal Sales representative, who resided and had his office without the District of Columbia was assigned to the territory consisting of the eastern half of Pennsylvania, Southern New Jersey, Delaware, Maryland, Northern Virginia and the District of Columbia. He worked out of Philadelphia and reported to the headquarters of the Tube Department at Harrison, New Jersey. He visited the District of Columbia every six or seven weeks. During such visits he worked with the distributors in a counselling capacity and in connection with the Tube Department's promotional activities. Orders for merchandise were sent directly to the warehouse of the Tube Department located outside the District of Columbia. If an order was handed to the representative it was incidental.

35. One Equipment Sales representative, who resided and had his office outside of the District of Columbia, was assigned a territory which extended from New Jersey to Florida, and included the District of Columbia. He
37 came to the District of Columbia every six or seven weeks. His visits lasted about three days, during which time he was in contact not only with customers in the District of Columbia, but in the surrounding areas of Maryland, and Virginia. He handled sales to five or six manufacturers in the District of Columbia. All such orders were sent to him at his office in Harrison, New Jersey.

36. All sales of products of the Tube Department to the United States Government were on open competitive bid-

ding. The bids for such business were prepared in Harrison, New Jersey.

37. The Tube Department maintained no office in the District of Columbia during the taxable years 1949, 1950, and the first fourth months of 1951. In May, 1951, it established an office in the District of Columbia for the purpose of maintaining liaison with the United States Government and obtaining information helpful in preparing bids on Government business, as illustrated by the following excerpt from the testimony of the Manager of Marketing Services of the Tube Department, concerning the office in the District of Columbia as follows:

"Q. What did that office consist of?

"A. A man and a secretary.

"Q. What responsibilities were assigned to that man?

"A. Liaison between the many government purchasing agencies and the management of the Tube Department.

"Q. Can you describe in somewhat greater detail, Mr. Bersche, by what you mean to include in the term 'liaison.'?

"A. Yes. Frequently, in special kinds of types of government equipment, perhaps under some secret classification, that equipment must be worked on and they must develop a special type of tube for that particular—that has a special application and will work in that particular equipment that we will be entitled to bid on if we can work out an application or a decision on such a product."

The office established in the District of Columbia had no relation to sales or selling, except as to sales to the United States Government on bids as indicated above. The field sales representatives had no space therein or in any other place in the District of Columbia. The Equipment Sales representative used the facilities maintained by the Tube Department in the District of Columbia solely as a telephone contact point, that is to say, on arriving in Washington, the

Equipment Sales representative telephoned the Washington office to learn if any telephone calls made by customers to his office in Harrison, New Jersey, had been transferred to the Washington office, or if any customer in the
38 District of Columbia had called that office in an attempt to get in contact with him. He received no mail there.

38. The petitioner concedes that the gross income from sales of the products of the Tube Department to the United States Government, and shipped into the District of Columbia, was from sources within the District of Columbia. Such sales during the taxable years were as follows:

1949	1950	1951
$35,921.36	$89,724.92	$197,943.53

39. The remainder of the sales of products of the Tube Department to customers in the District of Columbia during the taxable years were not principally secured, negotiated or effected by an employee, agent, officer or branch of the petitioner located in the District of Columbia. Such sales were as follows:

1949	1950	1951
$404,908.34	$485,042.73	$526,314.45

V

Engineering Products Department Sales

40. The Engineering Products Department manufactured and sold specially designed equipment for United States Government military use, and other special equipment such as public address systems, theater motion picture equipment and scientific instruments. The manufacture and sale of such products were directed from the headquarters of the Department in Camden, New Jersey.

41. The sales of the products of the Engineering Products Equipment to customers located in the District of Columbia during the taxable years involved were as follows:

	1949	1950	1951
Franchised distributors	$ 67,891.45	$153,320.52	$104,711.31
Manufacturers	10,287.00	324.00	664.60
Affiliated companies	15,791.54	19,138.63	19,132.27
Miscellaneous	69,722.13	89,438.92	250,330.78
U. S. Government	104,557.98	88,425.14	93,193.26
Total	$268,250.10	$350,647.21	$468,032.22

42. The Engineering Products Department had an office at 1625 K Street, Northwest, Washington, D. C., during the taxable years involved, in charge of Mr. Francis H. Engel, Manager, who resided in the District of Columbia. Its personnel consisted of five men, including the Manager,
39 all of them engineers or with engineering background, two or three secretaries and two or three office girls.

43. The function of the Washington office of the Engineering Products Department was as described in the testimony of the Manager as follows:

"BY MR. ZELLER:

"Q. Will you describe for us what the functions of your office are, Mr. Engel?

"A. Yes. My office basically is in Washington to assist the Federal Government, and particularly with respect to the military equipment such as radar, sonar, communications equipment, and so forth.

"I would say that the activity is 99½ per cent along that line.

"THE COURT: You say help them. What do you mean by that?

"THE WITNESS: The government is large and complex and they need to know lots of things. They know they want to do something and do not know how to do it because they have to write the specifi-

cations, and they call on us, and we talk to them and tell them what is going on in the electronics business and that you can accomplish a certain result by doing this, that and the other. We will help them to write a specification in competition with other manufacturers and take our chances on getting the bid on it.

"All they know is that they want a vacuum cleaner, to use a homely example, and we tell them what a vacuum cleaner is and how they should specify it to be made to be sure they get a good one. It may not be ours. That is left to competition."

* * * * * * * * * * *

"Q. During these three years tell us exactly what you did with reference to the sales to the government?

"THE COURT: I thought he said he helped the government.

"THE WITNESS: We have no sales contact and actually do not make the sales. We do not have a quota. Anything bought is bought by invitation to bid and is sent to various manufacturers and is not done through the office, and flows directly to the customer from our home office. We do not have an order book. We do not take orders.

"We assist our company to meet with the customer so that they can get together and work efficiently to arrive at a mutual understanding of what they are willing to pay for.

"In other words, we are an intermediary, a liaison between the two."

A negligible portion of time, that is to say, about one-half of one per centum, was spent on customers other than the Government.

44. The Washington office of the Engineering Products Department and its personnel had no responsibility or activity in connection with sales to customers other than the Federal and the District Government. Sales to distributors and dealers were the responsibility of field sales representatives working out of the Philadelphia and New York offices, to some extent as was true with respect to the other and above mentioned departments. If the Washington office received an inquiry concerning equipment or other merchandise, such inquiry was referred to a dealer or to a field sales representative. Neither Mr. Engel or his staff had anything to do with the field sales representatives.

45. During the taxable years involved American Amplifier and Television Corporation was the distributor of the products of the Engineering Products Department under letters dated and reading as follows:

"April 19, 1946

American Amplifier & Television Corporation
1111 Nineteenth Street, N. W.
Washington, D. C.

Gentlemen:

We are pleased to appoint you a Dealer for 16mm equipment in the Educational market. In making this appointment, we suggest and recommend that you confine your sales of our product to the territory which is outlined on the attached map. This appointment becomes effective as of this date.

In accepting this appointment as our Dealer, you do so with the understanding that it is subject to all of the terms and conditions of the sales and merchandising policy of the Company as it now exists, or as it may hereafter be changed at any time without notice.

We recognize your right to discontinue handling our product at any time without notice, and we reserve the right to cancel your appointment as our Dealer or to change prices or discounts without notice to you.

You will receive very shortly from the home office, complete policy, price, promotion and advertising information which will assist you in merchandising 16mm equipment.

It is our desire to cooperate fully with you and we will be glad to discuss any problems that may confront you in the merchandising and sale of our product at any time.

With best wishes for success, we are

Very truly yours,
RADIO CORPORATION OF AMERICA
(RCA VICTOR DIVISION)
J. G. Wilson
Operating Vice President."

• • • • • • • • • • •

"

July 6, 1948

American Amplifier & Television Corp.
1111 Nineteenth Street, N. W.
Washington, D. C.

Gentlemen:

We are pleased to appoint you as a Distributor of RCA Sound Products. This appointment supersedes your previous appointment(s) as a Sound Systems Distributor (and an Intercom Equipment Distributor). This change in status is made in order to conform to the new Sound Products Distribution

Policy announced April 6, 1948. With this reappointment, it is suggested and recommended that you confine your sales of all RCA Sound Products to the territory which you have been serving as an RCA Sound System Distributor. This appointment becomes effective as of this date.

In accepting this reappointment as our Distributor, you do so with the understanding that it is subject to all of the terms and conditions of the sales and merchandising policy of the Company as it now exists, or as it may hereafter be changed at any time without notice.

41 We recognize your right to discontinue handling our product at any time without notice, and we reserve the right to cancel your appointment as our Distributor, appoint additional outlets, or to change prices or discounts without notice to you.

Attached you will find a copy of the current sales policy for Sound Products. It is suggested that members of your organization familiarize themselves with the contents of this policy statement in order that uniformity of procedures may be observed.

Your very truly,
H. M. Winters
Director of Distribution"

• • • • • • • • • • •

" July 10, 1951

American Amplifier & Television Corp.
1111 Nineteenth Street, N. W.
Washington 6, D. C.

Gentlemen:

We are pleased to appoint you a distributor of RCA Intercom equipment, effective as of the above date.

In accepting this appointment as our Distributor, you do so with the understanding that it is subject to all of the Terms and Conditions of Sale pertaining to this product as they now exist, or may hereafter be changed at any time without notice.

We recognize your right to discontinue handling our products at any time without notice, and we reserve the right to cancel your appointment as our Distributor, withdraw the above products, or to change prices or discounts without notice to you.

You will receive very shortly from the Engineering Products Department home office policy, price, promotion and advertising information which will assist you in merchandising RCA Intercoms. It is our desire to cooperate fully with you and we will be glad to discuss any problems that may confront you in the merchandising and sale of this product at any time.

We look forward to a mutually profitable relationship and wish you a full measure of success.

Very truly yours,
RADIO CORPORATION OF AMERICA
(RCA VICTOR DIVISION)
Director of Distribution
Technical Products"

• • • • • • • • • • •

" September 26, 1951
American Amplifier and Television Corporation
Attention: Mr. C. H. Mahor, President
1111 Nineteenth St., Northwest
Washington 6, D. C.

Gentlemen:

Replying to your letter of September 24, you are correct in assuming that it was our intention to include the District of Columbia in the suggested and recommended territory on the sheet attached to our appointment letter to you as an RCA 'Antenaplex' distributor dated September 18, 1951.

You will find enclosed herewith a revised list and would ask that you kindly attach it to our letter of September 18 and destroy the list originally sent to you.

We are indeed sorry for this oversight and thank you for calling it to our attention.

Very truly yours,
H. V. Somerville
Director of Distribution
Technical Products."

46. There were no employees, officers, agents or representatives of the Engineering Products Department,
42 other than Mr. Engel and the personnel of his office, who resided or had an office or office space in the District of Columbia during the taxable years involved.

47. The petitioner conceded that sales of products of the Engineering Products Department to the United States Government and shipped into the District of Columbia during the taxable years involved constituted income from sources within the District of Columbia in the amounts following:

1949	1950	1951
$104,557.98	$88,425.14	$93,193.26

48. Sales to customers in the District of Columbia other than the United States Government, during the taxable years involved were not principally secured, negotiated or

effected by employees, agents, officers, or branches of the petitioner located in the District of Columbia. Such sales during such years were in the amounts following:

1949	1950	1951
$163,692.12	$262,222.07	$374,838.96

OPINION

Article I of the District of Columbia Revenue Act of 1947 is known as the District of Columbia Income and Franchise Tax Act of 1947 (Chapter 15, Title 47, D. C. Code, 1951 Ed). It imposes a franchise tax upon corporations and unincorporated business for the privilege of engaging in any trade or business in the District of Columbia. In Section 1(h), Title I of the Act (Sec. 47-1551c(h), D. C. Code, 1951 Ed) the term trade or business is defined to include "the engaging in, or carrying on of any trade, business profession, vocation or calling or commercial activity in the District of Columbia." Section 1 of Title X of the Act, among other things, provides:

> "The measure of the franchise tax shall be that portion of the net income of the corporation and unincorporated business as is fairly attributable to any trade or business carried on or engaged in within the District and such other net income as is derived from sources within the District."

Section 2 of Title X deals with the allocation and apportionment of net income of corporations and unincorporated businesses in the language following:

43 'Sec. 2. ALLOCATION AND APPORTIONMENT.—The entire net income of any corporation or unincorporated business, derived from any trade or business carried on or engaged in wholly within the District shall, for the purposes of this article, be

deemed to be from sources within the District, and shall, along with other income from sources within the District, be allocated to the District. If the trade or business of any corporation or unincorporated business is carried on or engaged in both within and without the District, the net income derived therefrom shall, for the purposes of this article, be deemed to be income from sources within and without the District. *Where the net income of a corporation or unincorporated business is derived from sources both within and without the District, the portion thereof subject to tax under this article shall be determined under regulation or regulations prescribed by the Commissioners. The Assessor is authorized to employ any formula or formulas provided in any regulation or regulations prescribed by the Commissioners under this article which, in his opinion, should be applied in order to properly determine the net income of any corporation or unincorporated business subject to tax under this article.*" (Emphasis supplied.)

Most, if not all of the States that impose taxes on income or, like the District of Columbia, excise taxes measured by income have formulas for apportionment of net income of unitary or multi-state businesses engaged in the manufacture and sale of personal property. In most instances such formulas have several factors, such as, for instance the so-called "Massachusetts Formula," which has, as factors in the equation, property, payroll and sales. In that way some of the net income is allocated or apportioned to the place where the merchandise is manufactured. In the District of Columbia, however, the Commissioners acting under the authority and discretion given them in Section 2 of Title X, quoted above, have seen proper to adopt a formula for the apportionment of net income of unitary businesses

containing but one factor, namely, sales, or really the gross receipts from sales in the District, which in the regulations are called "District sales."

During the taxable years here involved, namely the calendar years 1949, 1950 and 1951, there were in force regulations[2] adopted by the Commissioners for the allocation and apportionment of net income of unitary businesses engaged in the manufacture and sale of tangible personal property. Such regulations, as far as pertinent here, read as follows:

> "Sec. 10-2. The measure of the franchise tax shall be that portion of the net income of a corporation or unincorporated business as is fairly attributable to any trade or business carried on or
> 44 engaged in within the District, as defined in the Act, and such other net income as is derived from sources within the District. The portion of such net income which is 'fairly attributable' to any trade or business or such other net income as is derived from sources within the District shall be determined by allocation and apportionment thereof as prescribed in Secs. 10-2(b), 10-2(c), 10-2(d), 10-2(e)."

* * * * * * * * * *

> "Sec. 10-2(d). *Income from Trade or Business.* If the trade or business is carried on entirely within the District, the entire gross income from trade or business shall be allocated to the District. If the trade or business is carried on partly within and partly without the District, that portion of the gross income from trade or business to be apportioned to the District shall be determined as follows:

[2] Promulgated August 31, 1948, January 7, 1949 and October 16, 1950.

"(1) Income from sales of tangible personal property.

"a. Where gross income for any taxable year is derived from the manufacture and sale or purchase and sale of tangible personal property, the portion thereof to be apportioned to the District shall be such percentage of the total of such gross income as the District sales made during such taxable year bear to the total sales made everywhere during such taxable year. *For the purpose of this regulation the phrase 'District sales' shall mean the gross receipts from all sales made which were principally secured, negotiated, or effected by owners, employees, agents, officers and branches of the corporation or unincorporated business located in the District;* and the phrase 'total sales' shall mean the gross receipts from all sales." (Emphasis supplied)

Sometime after the close of the taxable years here involved, that is to say, on March 17, 1953, the Commissioners amended Section 10-2(d)(1)a of the regulations by eliminating the word "located", so as to make it read as follows:

"Sec. 10-2(d)(1)a. Where gross income for any taxable year is derived from the manufacture and sale or purchase and sale of tangible personal property, the portion thereof to be apportioned to the District shall be such percentage of the total of such gross income as the District sales made during such taxable year bear to the total sales made everywhere during such taxable year. For the purpose of this regulation the phrase 'District sales' shall mean the gross receipts from all sales made which were principally secured, negotiated, or effected by owners, employees, agents, officers and branches of

the corporation or unincorporated business in the District; and the phrase 'total sales' shall mean the gross receipts from all sales."

Later, on August 6, 1953, Section 10-2(d)(1)a, was further amended by the Commissioners to read as follows:

"a. Where income for any taxable year is derived from the manufacture and sale or purchase and sale of tangible personal property, the portion thereof to be apportioned to the District shall be such percentage of the total of such income as the District sales made during such taxable year bear to the total sales made everywhere during such taxable year. Every corporation and unincorporated business which carries on or engages in business in the District within the meaning of the words 'trade or business' as defined in the Act is, unless specifically exempted by some provision of the Act, subject to tax. For the purpose of this regulation, the phrase 'District sales' shall mean all sales to District customers in the income from which is fairly attributable to the trade or business carried on or engaged in within the District, including solicitation in the District by salesmen or other representatives of the taxpayer, that portion of sales to customers outside the District the income from which is fairly attributable to the trade or business carried on in the District, and sales of tangible personal property the income from which is from District sources."

Section 15 of the regulations adopted on August 6, 1953 recited that they "shall apply to the taxable year or part thereof beginning on the first day of January, 1948, and the succeeding taxable years."

What this Court is now called upon to do is to decide what s the tax liability of the petitioner to the District of Columbia under the foregoing provisions of the law and the regulations above quoted, coupled with the following facts concerning the petitioner's activities in relation to the District of Columbia.

The petitioner manufactures and sells many articles of merchandise in the electronic field, including phonographs, radio and television sets, tubes, batteries, amplifying systems, recording records and the like. During the taxable years it sold its products to customers in the District of Columbia through four product departments, namely, Home Instrument, Record, Tube and Engineering Products Departments. A large quantity of merchandise was sold to wholesalers who were called "distributors" and who were appointed as such by letters from the petitioner or from one of its subsidiaries which it succeeded. Such "distributors" were no more than wholesalers, and were not agents of the petitioner. The circumstances of their appointment, the delineation of their relationship to the petitioner and the course of conduct of the parties did not measure up to the requirements of an agency as found in *Carroll Electric Co. v. Freed-Eisemann Radio Co.*, 60 App. D. C., 228, 50 F. 2d 993, and the cases therein cited. They were merely customers.

The petitioner's gross receipts from business with customers in the District of Columbia by its product departments during the taxable years were as follows:

Department	1949	1950	1951
Home Instrument	$3,408,875.33	$5,282,511.93	$3,584,938.98
Record	261,529.41	308,190.87	424,864.39
Tube	440,829.70	574,767.65	724,257.98
Engineering Products	268,250.10	350,647.21	468,032.22
	$4,379,484.54	$6,516,117.66	$5,202,093.57

Of the foregoing there were sales to the United States of merchandise delivered in the District of Columbia
46 as follows:

Department	1949	1950	1951
Home Instrument			$459.04
Tube	$ 35,921.36	$89,724.92	$197,943.53
Engineering products	104,557.98	88,425.14	93,193.26
Total	$140,479.34	$178,150.06	$291,595.83

In respect of the business done by the Record Department in the District of Columbia, part of the gross receipts represented amounts received as rental of records to radio broadcasting stations and other lessees in the amounts following:

1949	1950	1951
$3,710.60	$12,859.89	$16,760.00

The petitioner concedes that sales to the United States were "District sales" and should be considered as the sales factor in the formula for determining the portion of the petitioner's net income that should be apportioned to the District of Columbia. It also concedes that the income from the rental of records to lessees in the District should be allocated to the District under Regulation 10-2(c) in force during the taxable years, and which, in part, provided that "Interest, dividends, rents and royalties received from sources in the District, shall be allocated to the District." But as to other sales the petitioner insists that under the applicable regulations they were not "District sales" and had no place in the computation of the correct franchise tax to be assessed against it.

From time to time field sales representatives and some of the officers of the petitioner visited the customers in the District to promote the sale of its products, including the negotiation of the "quota" of products which a particular customer was expected to take and sell, assistance in training of selling personnel, visiting the retail customers of the wholesaler or distributor and generally creating good-will for the petitioner in the trade. The field sales representatives did not as a rule procure orders for merchandise. If such happened during the taxable years it was incidental.

None of the field sales representatives resided or had an office in the District of Columbia, and no sale of products to customers in the District of Columbia was secured, negotiated or effected by any employee, agent, officer or branch of the petitioner located in the District.

47 The Home Instrument and the Record Departments had no office in the District of Columbia. The Tube Department had an office in the District from May 1, 1951; and the Engineering Products Department had an office here during the three taxable years. Such offices were solely for the purpose of liaison between the petitioner and the purchasing agencies of the United States Government, and their primary function was to assist the Government employees in the preparation of specifications for tubes and electronic equipment and the like. Such offices made no sales, took no orders. All sales to the United States were made on bids prepared at the home office of the particular department and submitted by mail to the Government. The functions and activities of such offices were wholly unrelated to the sale of merchandise to other customers in the District of Columbia.

The petitioner had two other offices in the District of Columbia, one of the Patent Department for the sole purpose of attending to the patent features of the petitioner's business, such as the obtaining of patents and the like; and the other of the Frequency Bureau, the sole function of which was to advise the petitioner and its radio broadcasting subsidiaries, such as the National Broadcasting Company, on the use and assignment of the broadcasting frequencies by the Federal Communications Commission, Department of State and Department of Defense. Such offices had nothing to do with sales.

The foregoing were the only offices or places of business of the petitioner in the District of Columbia. Its corporate office was in New York City, and all of its divisions, departments and manufacturing plants were located without the District of Columbia.

To decide the issue before it, the Court must first determine what regulations apply—those in force during the taxable years or those adopted some years afterward. And then, having settled that matter, the Court must decide whether under the appropriate regulation and the facts the assessment here assailed was proper, and, if not, to what extent.

The petitioner insists that the regulations in force during the taxable years should determine its liability—that
48 it is not fair to change the rules after the game is finished, so to speak. On the other hand, the respondent contends that the regulations adopted August 6, 1953, apply in this case, because in such regulations it was provided that they should apply to the taxable year beginning January 1, 1948 and all succeeding taxable years. The petitioner as a second string to the bow argues that, even if the regulations of August 6, 1953, apply here, it is not liable for any part of the taxes involved, except that portion which is to be computed in relation to sales to the United States Government and to rentals of records in the District of Columbia. Such alternative position of the petitioner will not be considered or discussed by the Court, because the Court is of the opinion that the regulations in force during the taxable years govern the determination of the character of sales to customers in the District, that is to say, whether or not they were "District sales" for the purposes of apportionment of net income of the petitioner.

The formula for the apportionment of net income of multistate or unitary businesses, (Section 10-2(d)(1)a) adopted by the Commissioners in exercise of the authority granted in the Income and Franchise Tax Act provided that in respect of the sale of tangible personal property there should be apportioned to the District that portion of the gross income of the unitary business as District sales bore to total sales of that business; and that "District sales" meant the gross receipts from sales which were principally

secured, negotiated, or effected by the owners, employees, agents, officers or branches of the business located in the District." The Court believes that such regulation was valid; that it was proper exercise of the authority granted the Commissioners in the Act, and that it did no violence to the letter or spirit to the Income and Franchise Tax Act. While as observed above, the formula with but one factor, gross receipts, was somewhat hard on non-resident unitary businesses, and out of line with the formulas in many States, and while on the other hand, it was lenient in limiting such factor to sales secured, negotiated and effected the agents of the unitary business "located in the District," it cannot be said to be in conflict with the Act.

49 In *Pierre M. Ghent* v. *District of Columbia*, Docket No. 1397, this Court was called up to decide whether a regulation adopted on March 17, 1953 could be applied to taxable years prior thereto, where, as here there was a valid contrary regulation in force during such taxable years. The Court gave a great deal of thought and study to the question; and in the course of its opinion in that case said:

> "The Court is of the opinion that the regulations adopted March 17, 1953, are not applicable. While there is support in the decisions of the Supreme Court for the proposition that regulations may be applied retroactively, the rule seems to be that such cannot be done if during the taxable year there were in effect contrary regulations pertaining to the subject matter. It is only where there are no prior regulations that retroactivity is permitted. In *Helvering* v. *R. J. Reynolds Tobacco Company*, 306 U. S. 110, 83 L. Ed. 536, 581, 59 S. Ct. 423, an attempt was made to apply retroactively regulations adopted after the close of the taxable year there involved. Such was denied by the Supreme

Court, speaking through Mr. Justice Roberts, who said:

> 'Petitioner urges that the amendment operates retroactively and governs the ascertainment of gross income for taxable periods prior to the date of its promulgation, and, further, since Congress has reenacted § 22 (a) in the Revenue Acts of (June 22) 1936, (49 Stat. at L. 1648, 1657, chap. 690) and (May 28) 1938 (52 Stat. at L. 452, 457, chap. 289, 26 U.S.C.A. § 22(a), it has approved the regulation as amended. We hold that the respondent's tax liability for the year 1929 is to be determined in conformity to the regulation then in force.'

Following the *Reynolds* case closely was *Helvering* v. *Wilshire Oil Company*, 308 U.S. 95, 84 L. Ed. 101, 105, the opinion in which was delivered by Mr. Justice Douglas. There we find this language:

> 'These regulations applied prospectively only and did not purport to reach back to earlier years when the taxpayer relied on a different rule or practice.'
>
> '* * * *
>
> 'We are not dealing here, as was this Court in *Helvering* v. *R. J. Reynolds Tobacco Co.*, 306 U. S. 110, 83 L. Ed. 536, 59 S. Ct. 324, *supra*, with regulations applied retroactively. These are applied prospectively only.'

50

"The second *Reynolds* case, namely, *Helvering v. Reynolds*, 313 U. S. 428, 85 L. Ed. 1438, 1441, delivered by Judge Douglas also dealt likewise with

retroactivity of regulations. While retroactivity was permitted, it was done so by distinguishing that case from the first Reynolds case in this way:

> 'Nor is Art. 113(a) (5)-1(b) of the Regulations condemned by *Heivering* v. *R. J. Reynolds Tobacco Co.*, 306 U. S. 110, 83 L. Ed. 536, 59 S. Ct. 423, *supra*. That case turned on its own special facts. The transactions there in question took place at a time when a regulation was in force which expressly negatived any tax liability. The regulation remained outstanding for a long time and was followed by several re-enactments of the statute. About five years after the transactions in question took place the prior regulation was amended so as to impose a tax liability. There are no such circumstances here. *No relevant regulation was in force at the time respondent sold the securities in 1934.*' (Emphasis supplied).

50 "*Manhattan General Equipment Co.* v. *Commissioner*, 297 U.S. 129, 80 L.Ed. 528, relied upon by the respondent, was decided before the first *Reynolds* case. There is, however, no real conflict between the two cases, because in the *Manhattan General Equipment case* the earlier regulation was held to be invalid, so that for the purposes of the decision there was no prior regulation, as in the instant case.

"The respondent has cited as supporting the validity of regulations Sec. 325 of Mertens Law of Federal Income Taxation entitled 'Power of the Commissioner to Apply Regulations Prospectively and Retroactively' found on pages 102 to 110, in Vol. I of that very excellent work on taxation.

There is nothing in the above mentioned section of Mertens to justify the position of the respondent. On the contrary it supports the proposal that regulations will not be applied retroactively where there has been a prior contrary regulation in effect during the taxable years involved. After discussing the two Reynolds cases Mertens has this to say:

'* * * *

'It is reasonably clear that his decision indicates that the Supreme Court would approve changes in the regulations prospectively applied where there had been no prior regulation and it would reasonably follow that it would likewise approve prospective regulations even though there had been prior regulations expressing a contrary interpretation. The case is also authority for the point that the Supreme Court will approve retroactive regulations insofar as they are promulgated under an existing statute and are issued within a reasonable time after the enactment of that act where there are no prior regulations to the contrary. The Supreme Court would also probably approve a retroactive application of the regulations under prior acts where there was no specific regulation to the contrary in existence during the prior years, although the decision in the later Reynolds case is not direct authority for this conclusion.

The language of the opinion in the later Reynolds case permits the argument that regulations will not be retroactively applied where they are in conflict with a regulation to the contrary, which was in force during the prior year and which covered the issue specifically.

'* * * *.'

"See also *Aluminum Company of America* v. *United States*, 123 F. 2d 615."

The *Pierre M. Ghent* case was appealed to the United States Court of Appeals for the District of Columbia Circuit, and was reversed on another ground. See *District of Columbia* v. *Pierre M. Ghent*, 220 F. 2d 210. The Court of Appeals did not reject, or disturb this Court's holding in respect of the retroactive application of the regulation, but rather approved it by deciding the case on the regulation which this Court held applicable under principles stated in the excerpt of the opinion above quoted. This is clear from the language in the second paragraph of Footnote (1) of the opinion of the Court of Appeals as follows: "The regulations adopted under authority of the statute, and in force during the three years in question etc," and from the opinion itself. This Court is still of the same view as expressed in the *Pierre M. Ghent* case, and holds here, as it did
51 there, that the regulations adopted after the close of the taxable years cannot operate retroactively where there was during such years a valid contrary regulation.

The regulations in force during the taxable years involved, as will be seen above, defined "District sales" as those "principally secured, negotiated or effected by owners, employees, agents, officers, and branches of the corporation or unincorporated business located in the District". In *Owens-Illinois Glass Co.* v. *District of Columbia*, Docket No. 1215, this Court was called up, on remand from the United States Court of Appeals, to interpret and apply Section 10-2(d)(1)a, of the Regulations, that is to say, what the word "located" therein meant. The respondent insists that the opinion of this Court in that respect was erroneous; and that "Faced with this dilemma the Commissioners on August 6, 1953, amended the regulations promulgated October 16, 1950, supra, and made the effective date January 1, 1948". There was another course open to the respondent,

namely, appeal to the United States Court of Appeals, a step which this Court regrets was not taken, because the correct meaning of the word "located" would have been finally determined. As it is the opinion of this Court in the *Owens-Illinois Glass Co.*, case, is precedent which should be followed. It is hoped, however, that the two principal legal questions herein presented may be finally and satisfactorily settled by an appeal from the decision in this case to the United States Court of Appeals. With that in mind, it would seem appropriate to quote more at length, perhaps, than ordinarily would be required, from the opinion of this Court in the *Owens-Illinois Glass Co.*, case as follows: 52

> "The solution of the question, therefore, turns on the meaning of the word 'located'. The petitioner claims that it has the implication of permanency or settled locale as distinguished from temporary physical presence, and that none of the officers or agents who secured, negotiated or effected the sales to customers in the District of Columbia were located therein. On the other hand the respondent contends that the term 'located' has some relation to time, in that, if the selling officer or agent was physically present in the District of Columbia at the time he secured, negotiated or effected the sale, then he was 'located' in the District and the requirement for a valid assessment under the regulations was met. The Court believes that the position of the respondent is untenable and that the petitioner is correct in its contention that the selling agent must have some permanent connection with the District of Columbia, such as residence or attachment to an office or branch of the taxpaying corporation in the District of Columbia. The Court believes that under the findings as made none of the agents or officers securing, negotiating or effecting

sales to customers in the District of Columbia was located therein.

52 "There is nothing peculiarly technical about the regulations, and remembering that their purpose is to administer the law and explain its provisions to the ordinary citizen the words should be given their ordinary and accepted meaning. None of the dictionaries, ordinary or legal, define the word 'located' in the setting in which it is found in the regulations, but the definition of the word 'locate' is as follows in several dictionaries:

"In *Webster's Collegiate Dictionary*: '2. To set or establish in a particular spot. 4. To assign a place to.—v.i. Colloq. To take up one's residence; to settle.'

"In *Funk & Wagnalls New College Standard Dictionary*: '1. To establish or place in a particular situation or spot; place; settle. 7. To settle; establish residence; also to reside or live'.

"In *Universal Self-Pronouncing Dictionary*: 'to place, establish; mark out and determine the position of: v.i. to settle'.

"In *Webster's National Dictionary*, 2nd Ed. (1944): '2. To set or establish in a particular spot, or position; to station. To establish in a charge or office. Intransitive—to place oneself; to take up one's residence: to settle; as, he located in Ohio. (Colloq.)'

"There is no applicable definition in 'Words & Phrases' or Bouvier's Law Dictionary, but in *Black's Law Directory* the word 'locate' is defined as 'to ascertain and place the position of something'; and in *Baldwin's Pocket Law Dictionary*

the term is stated to mean 'to place,; to fix, ascertain or designate the place (locus) of a thing'.

"If the respondent were correct in its claim as to the interpretation of Section 10-2(d)(1)a of the regulations, the word 'located' could very well be stricken from the pertinent phrase so as to make it read 'principally secured, negotiated or effected by owners, employees, agents, officers and branches of the corporation or unincorporated business in the District'. The regulations were expertly drawn and it is apparent that the draftsmen had the facility of expression. It is not believed that such draftsmen would have included the word 'located' in the phrase or that the Commissioners would have approved the regulations if such word was intended to have no meaning.

"It is interesting to note that on March 17, 1953, the Commissioners amended Section 10-2(d)(1)a by striking out the word 'located', so that the pertinent part of the regulation now in force actually does read 'principally secured, negotiated, or effected by owners, employees, agents, officers and branches of the corporation or unincorporated business in the District of Columbia'. In that connection in its brief to which was attached the amended regulation of March 17, 1953, the respondent claims that this case should be disposed of on the basis of such amended regulation instead of that in force during the taxable year here involved. Such contention is without merit."

It appears from the facts and from the Court's interpretation of the regulations in force during the taxable years, that, in respect of sales of the petitioner s products to customers in the District of Columbia, none of such sales were secured, negotiated or effected by any employee, agent,

officer or branch of the petitioner located in the District of Columbia. That being so the gross receipts from such sales, except, of course, sales to the United States, have no place, and must not be included in the sales factor in the formula for the apportionment of the net income of the petitioner to the District of Columbia. The petitioner has conceded that the gross receipts from sales to the United States of merchandise delivered in the District of Columbia, and the amounts received as rentals of records to lessees in the District comprise income from sources within the District. The correct computation, therefore, of the franchise taxes that were due by the petitioner for the three taxable years involved will require the elimination from the sales factor of the amount of gross receipts from sales to customers in the District of Columbia, other than the United States, and the inclusion in the sales factor the amount of gross receipts from sales to the United States. To the portion of the net income thus determined there must be added the amount received as rental of records to lessees in the District of Columbia, plus interest at the rate of 6 per centum per annum on the total amount for each year respectively from the due date of the returns respectively, to October 5, 1954. The refund to which the petitioner is entitled is to be computed by deducting the previous taxes and interest that were due on October 5, 1954, from the franchise taxes and interest paid on that date for the taxable years involved. To the sum of such net amounts must be added interest at the rate of 4 per centum per annum for the period from October 5, 1954, to date of payment of the refund, minus one month.

53

Decision will be entered under Rule 30.

/s/ Jo. V. Morgan
Jo. V. Morgan,
Judge

54 FILED JUL 15 1955 District of Columbia Tax Court

Docket No. 1463

COMPUTATION FOR ENTRY OF DECISION UNDER RULE 30 OF THE RULES OF PROCEDURE BEFORE THE DISTRICT OF COLUMBIA TAX COURT

Pursuant to the opinion of this Court entered in the above-entitled cause on June 29, 1955, wherein this Court stated that the decision of this Court would be entered pursuant to Rule 30 of the Rules of Procedure before the District of Columbia Tax Court, the District of Columbia submits to the Court a computation, as set forth on Exhibit "A" attached hereto, of the refunds of tax to be entered in this case in accordance with the findings of fact and opinion of this Court.

On February 2, 1955, petitioner Radio Corporation of America filed a motion for continuance of the hearing of this case from February 9, 1955 to March 9, 1955, which motion was granted by this Court on February 3, 1955. Paragraph three of the motion of petitioner for continuance stated:

> "3. In the event that this motion is granted, the petitioner agrees to waive interest for the period of one month on any refund which may be allowed."

Respondent District of Columbia does not, by the filing of this computation of the amount of refunds of
55 tax due petitioner, concede the correctness of the conclusion of the District of Columbia Tax Court that petitioner is entitled to a refund of any of the taxes assessed against it.

56

COMPUTATION OF DISTRICT OF COLUMBIA UNDER RULE 30 OF REFUNDS OF TAX DUE PETITIONER RADIO CORPORATION OF AMERICA

	Calendar Years 1949	1950	1951
Net income subject to apportionment	$ 35,929,041.24	$ 88,701,818.59	$ 37,699,692.70
x apportionment factor*	.000490	.000394	.000715
Portion attributable to D. C.	17,605.23	34,948.52	26,955.28
Rental income allocable to D. C.	3,710.60	12,859.89	16,760.00
Corrected D. C. net taxable income	$ 21,315.83	$ 47,808.41	$ 43,715.28
Tax @ 5%	1,065.79	2,390.42	2,185.76
Less amount reported on return	437.60	1,555.19	697.68
Deficiency	$ 628.19	$ 835.23	$ 1,488.08
*Computation of apportionment factor:			
A. Total sales all sources	$286,724,157.34	$452,676,201.68	$407,542,968.59
B. Total District sales:			
Sales to U.S. Government			
1. Tube Department	$ 35,921.36	$ 89,724.92	$ 197,943.53
2. Engineering Products Dept.	104,557.98	88,425.14	93,193.26
3. Home Instrument			459.04
Total	$ 140,479.34	$ 178,150.06	$ 291,595.83
C. Apportionment factor (B÷A)	.000490	.000394	.000715

57

	Calendar Years 1949	1950	1951
Summary			
Tax reported on return	$ 437.60	$ 1,555.19	$ 697.68
Deficiency assessments			
Tax	27,001.41	62,287.94	23,364.15
Interest	7,182.38	12,831.32	3,411.17
Total tax & interest asessed & paid	$ 34,621.39	$ 76,674.45	$ 27,473.00

Corrected:				
Tax per return	437.60	1,555.19	697.68	
Deficiency pursuant to opinion of D. C. Tax Court				
Tax	628.19	835.23	1,488.08	
Interest (Due date of return to 10/5/54	168.56	174.00	220.73	
Total tax liability	$ 1,234.35	$ 2,564.42	$ 2,406.49	
Refund Computation				*Totals*
Total tax & interest asessed and paid	$ 34,621.39	$ 76,674.45	$ 27,473.00	$138,768.84
Total tax liability pursuant to opinion of D. C. Tax Court	1,234.35	2,564.42	2,406.49	6,205.26
Amount refundable to petitioner pursuant to opinion of D. C. Tax Court	$ 33,387.04	$ 74,110.03	$ 25,066.51	$132,563.58

58 FILED JUL 22 1955 District of Columbia Tax Court

Docket No. 1463

DECISION

The petitioner and the respondent having each filed herein its computation under Rule 30, and the Court having considered said computations and the evidence taken at the hearing of this appeal and the findings heretofore made herein, it is by the Court this 22nd day of July, 1955,

ADJUDGED AND DETERMINED, That franchise taxes and interest thereon for the calendar year 1949, in the total sum of $33,387.04 were erroneously assessed and collected from the petitioner; and that the petitioner is entitled to a refund thereof with interest thereon at the rate of 4 per centum per annum from October 5, 1954, to date of payment of the refund, minus one month, and it is

FURTHER ADJUDGED AND DETERMINED, That franchise taxes and interest thereon for the calendar year

1950, in the total sum of $74,110.03, were erroneously assessed and collected from the petitioner; and that the petitioner is entitled to a refund thereof with interest thereon at the rate of 4 per centum per annum from October 5, 1954, to date of payment of the refund, minus one month.

AND IT IS FURTHER ADJUDGED AND DETERMINED, That franchise taxes and interest thereon for the calendar year 1951, in the total sum of $25,066.51, were erroneously assessed and collected from the petitioner; and that the petitioner is entitled to a refund thereof with interest thereon at the rate of 4 per centum per annum from October 5, 1954, to date of payment of the refund, minus one month.

/s/ Jo. V. Morgan
Jo. V. Morgan
Judge

. . . . . .

64 PROCEEDINGS

THE COURT: You may proceed.

MR. ZELLER: If the Court please, this is an appeal by the Radio Corporation of America from the assessment of franchise taxes under the District of Columbia Franchise Tax Act of 1947 as amended.

Now, the years in issue here today are 1949, 1950 and 1951.

R.C.A., and I shall so refer to the petitioner, Your Honor, is a corporation organized under and existing under the laws of the State of Delaware. Its principal place of business is maintained at New York City, at 30 Rockefeller Plaza.

R.C.A. makes sales throughout the United States including the District of Columbia. R.C.A. duly filed franchise tax returns for the years which are here in issue.

The essential question in this case today is what is the correct measure of the tax imposed on the R.C.A. under the District of Columbia Franchise Tax Law. This stands on the proper apportionment of R.C.A.'s income for 1949, '50 and '51, between sources within and sources without the District.

Now, the Franchise Tax Law prescribes that that apportionment shall be determined under regulations adopted by the Commisisoners of the District of Columbia,
65 not by the Assessor.

The regulations in force during the years in question provided that the income of a corporation derived from a trade or business carried on both within and without the District should be apportioned on the basis of a comparison of the gross sales of the company everywhere with sales defined in the regulation as District sales. And that, Your Honor, seems to be the phrase of art with which we are concerned here today.

* * * * * * * * * *

Now, the terms "District sales" under the regulations which were actually in effect during the years '49, '50 and '51 means the sales principally secured or negotiated by agents, officers or employers of the taxpayer located—and I emphasize located—in the District of Columbia.

I want to point out at the outset, Your Honor, that there is an issue between R.C.A. and the Assessor as to which regulations are applicable to the years here in question.

During these years '49, '50 and '51, the test laid down by the regulation which was then in force stating
66 it in some reform, was whether the sale was made by a salesman who was located in the District.

Now, the problem, whether this regulation and this test ought to be applied, arises because, on March 7, 1950, the Commissioner amended the regulation to strike out the word "located."

Subsequently, on August 6, 1953, the regulation was further revised for what appears to be the evident purpose of eliminating the test of whether the salesman was located in the District.

Moreover, the assessor claims that these amendments are retroactive so as to change the rule which actually existed during the years in question when the sales were made.

Now, it is our, R.C.A.'s position here today, that the assessment objected to is wrong for the following reasons:

If you apply the regulation which was actually in effect during the years in question, the fact is, as we shall show, the great majority of the R.C.A.'s sales which the Assessor has treated as District sales, were not District sales because they were not made by salesmen located in the District.

We do not believe that the 1953 regulation which purported to eliminate this test of location retroactively can be applied retroactively under the decisions of this Court in the Owens-Illinois and Lever Brothers cases, nor
67 under the decision of the Court of Appeals for the District of Columbia in the Pierre Ghent case.

Moreover, our proof will show that a very substantial part of the R.C.A. sales to customers located in the District were not District sales, again to use the phrase, even within the meaning of the 1953 regulations.

* * * * * * * * * * *

75 Thereupon,

JOHN S. CARTER

being first duly sworn, testified upon his oath as follows:

DIRECT EXAMINATION

BY MR. ZELLER:

Q. Mr. Carter, will you state your full name for the record? A. John S. Carter.

Q. What is your residence? A. 219 East Main Street, Moorestown, New Jersey.

Q. What is your occupation? A. My position is vice president, Finance and Administration, Radio Corporation of America.

Q. How long have you been with RCA? A. Since 1935.

Q. Where is your office located, sir? A. In Camden, New Jersey.

Q. Where was your office located during the years in question, 1949, '50, '51? A. In Camden, New Jersey.

* * * * * * * * * *

76 Q. Would you tell us, Mr. Carter, how the domestic
77 manufacturing and sales activities of RCA were organized during these three years: 1949, '50, '51? A. The domestic manufacturing and sales activities of RCA were conducted by four products departments. These were the Engineering Products Department, the Home Instruments Department, the Record Department and the Tube Department.

Each of these departments was organized as a separate business. By that I mean that they had a general manager who was usually a vice president of the corporation; they had their own chief engineer and engineering staff; they had their own financial department, headed by a comptroller; they had their own sales department headed by a sales manager; they designed and produced their own line of products which varied from year to year; they had their own manufacturing facilities and they had their own general office.

In the case of Engineering Products, that general office was located at Camden, New Jersey and their manufacturing facilities were located at Camden, Detroit and Los Angeles, I believe.

In the case of Home Instruments, the general office was located at Camden, New Jersey, with manufacturing facilities at Camden, Indianapolis and Bloomington.

THE COURT: Illinois?

THE WITNESS: Indiana, sir. I should have added when I was speaking of Engineering Products, that this
78 product department manufactures and sells industrial electronic equipment both to commercial customers and special apparatus for the United States Government.

The Home Instrument Department manufactures and sells radio sets, television sets, and phonographs.

The Tube Department had its general office at Harrison, New Jersey; it manufactures and sells electron tubes, tube parts, tube-making machinery, and batteries.

It had manufacturing facilities at that time at Harrison, New Jersey, Lancaster, Pennsylvania, Marion, Indiana, and Indianapolis, Indiana.

THE COURT: I think it should be understood, if it is not already—certainly I understand it—that what the witness is testifying and what other witnesses will testify is the situation as existed during the taxable years involved.

. . . . . .

THE WITNESS: I believe I have not talked about the Record Department.

This company is located in Camden, New Jersey, with their general offices and its manufacturing facilities at In-
dianapolis and for at least a part of the period, at
79 Cannonsburg, Pennsylvania, and New York City and Los Angeles.

BY MR. ZELLER:

Q. Mr. Carter, I believe you may have misspoken yourself. You referred to the Record Department as a company. A. Record Department,—I am sorry.

Q. Can you tell us whether or not, Mr. Carter, any of these four products departments had manufacturing facilities in the District of Columbia? A. They did not.

Q. Can you tell us whether or not any of these four products departments maintained a warehouse or stock of goods here in the District? A. They did not.

Q. Did any part of RCA, regardless of whether it was a products department or not, have manufacturing facilities in the District? A. No, sir.

Q. Would your answer be the same as to the maintenance of warehouses or stocks of goods in the District? A. It would be the same answer: No.

* * * * * * * * * *

80 BY MR. ZELLER:

Q. How did the products sold by RCA to customers located in the District come into the District? A. They were shipped by various means from sources outside the District of Columbia.

THE COURT: By common carriers?

THE WITNESS: Yes, sir.

BY MR. ZELLER:

Q. Will you tell us what offices in the District were maintained by RCA during the three years in question? A. The Engineering Products Department had an office in the Commonwealth Building on "K" Street, I believe, during the entire period in question.

Within that office there were two other activities of RCA that had office space. Those were the Patent Department and Frequency Bureau. I believe that those two activities were there during the entire period in question.

The Tube Department opened an office at "K" Street, and I believe the address was 1757—it was the Beacon Building—and I think the date was about the middle, May or June of 1950, or 1951, I believe.

* * * * * * * * * *

81 CROSS EXAMINATION

BY MR. WIXON:

. . . . . .

84 Q. The Engineering Products Department of the Radio Corporation of America, I understand, maintains an office on K Street in the District of Columbia or maintained an office on K Street in the District of Columbia during the tax years here in question? A. Yes, sir.

Q. Do you know how many employees were located at that particular office on K Street during these years? A. No, sir.

Q. You have no idea, sir? A. I have an idea, but I cannot testify with accuracy.

Q. What was the title, sir, of the o...cer of the corporation who was in charge of the Engineering Products Department? A. Vice president and general manager, I believe.

Q. And he would be a vice president and general manager of the Radio Corporation of America? A. Correct.

Q. Now, all of the officers, I take it, and employees of the Radio Corporation of America who were connected with these departments were actually employees of the Radio Corporation of America, were they not, sir, rather than employees or officers of a department of the Corpora-

85 tion. A. They were employees or officers of the Radio Corporation of America.

. . . . . .

86 THE COURT: You are familiar with the corporate structure of RCA, are you not, generally?

THE WITNESS: Yes, sir.

THE COURT: And it has a president and Board of Directors, too?

THE WITNESS: Yes, sir.

THE COURT: Operates like most other corporations, does it not?

THE WITNESS: Yes, sir.

THE COURT: These separate divisions, they have their own bank accounts and finances?

87 THE WITNESS: The individual product departments do not have their own bank accounts. During this period, the Victor Division operated its own bank account and would maintain bank accounts for each product division.

THE COURT: Well, some of them made a profit, did they not?

THE WITNESS: Yes, sir.

THE COURT: Where did the profits go?

THE WITNESS: The profits went to the Radio Corporation of America.

THE COURT: And were distributed to the stockholders?

THE WITNESS: Pardon?

THE COURT: And were distributed to the stockholders?

THE WITNESS: Distributed to stockholders in the form of dividends.

THE COURT: All right, that is all.

* * * * * * * * * * *

88 Thereupon,

CONDER C. HENRY

being first duly sworn, testified upon his oath as follows:

DIRECT EXAMINATION

BY MR. ZELLER:

Q. Will you please state your name for the record, please? A. My name is Conder C. Henry and my official address today is 711 14th Street, N. W., Washington, D. C.

Q. Is that your office address in the District? A. Yes, sir.

Q. What is your residence, sir? A. My residence address is 4432 Argyle Terrace, N. W.

Q. What is your occupation, Mr. Henry? A. I am manager of the Washington Patent Department of Radio Corporation of America.

Q. And how long has the Patent Department had a Washington office, to your knowledge? A. Well, I came with the department in February, 1946. They had a Patent Department before I arrived. I cannot tell you the exact date, but I understand it has been some years.

* * * * * * * * * * *

89 Q. Now, will you tell us, Mr. Henry, what the function of your office was? By that I mean the Washington office of the RCA Patent Department during these years in question: '49, '50, '51?

* * * * * * * * * * *

A. During those three years the function of the office was primarily a search office for RCA. It also was a training office for patent attorneys. In addition to that, it was more or less a trouble-shooting office for patent applications that were in trouble in connection with patent office in the courts. By that I mean, we did every phase of the work connected with the prosecution of the patent applications through the patent office and the courts.

Q. When you say it was a search office, Mr. Henry, what do you mean by that? A. I mean that the bulk of the work in connection with the new invention consists in making an investigation of the prior art to determine the extent of novelty in that invention. On the basis of that search a judgment is made as to whether or not to prepare and

90 file an application for patent in the first place.

Now, that would be one aspect of the search work. Another aspect would be to make searches of the prior art to determine the validity of patents which RCA may want to buy.

Then another aspect of it, to complete the answer, is to make what is known as patent approval searches.

Q. Mr. Henry, will you tell us whether your office had any connection with the Victor Division of RCA? A. The only connection that we had with RCA Victor or any other branch of RCA would be to handle patent disclosures originating in those divisions.

* * * * * * * * * *

Q. Were those the duties which you have already described for the record, all of your duties, Mr. Henry?

A. Well, I had nothing to do with sales, if that is
91 what—

THE COURT: He just asked you, did you have any other duties besides those you mentioned?

THE WITNESS: No other specific duties, no, sir.

Q. Can you tell us whether or not anyone not connected with your office made use of your office during these three years?

* * * * * * * * * *

THE WITNESS: The Legal Department has used my office during those years.

BY MR. ZELLER:

Q. Any other department? A. No, sir.

Q. Will you tell us what the size of your office staff was during those years? A. I can't answer that question accurately, but it consisted of from two to three secre-
92 taries and from six to nine assistants who were at least, one of whom was both an engineer and a lawyer and all of the assistants were engineers, and most of them were attending law school.

Q. Who is Mr. C. P. Coe? A. He is vice president of RCA and Chairman of the Patent Policy Committee.

Q. Will you tell us whether or not he had an office in Washington during this period? A. He maintained an office in Washington and also in New York.

* * * * * * * * * *

96 BY MR. WIXON:

Q. Are all of these employees in this office, or were all of these employees in this office full time employees of the Radio Corporation of America? A. With the exception of a stenographer. We had to take on an extra stenographer in the summertime during vacation, but they are full time employees.

Q. Those you have enumerated, with the exception of the occasional additional stenographer were permanent employees? A. That's right.

Q. Did there ever come a time when the Radio Corporation of America, in the years in question, would send to this office an additional employee of the corporation for the purpose of working in your office or with you on the particular or specific matters? A. Yes, sir.

Q. How often did that occur, sir, during these years? A. I can't testify with respect to that, those years you are asking me, to remember the details—

Q. But would you say that was frequent or infrequent? A. Very infrequent.

97 Q. Infrequent? A. Sometimes they would send down attorneys to work with me in the office, patent attorneys. Sometimes they would send—

Q. Did they send engineers too, occasionally? A. I think all of the patent attorneys in RCA are engineers and sometimes they would send people down for special training for short periods of time for two weeks or three weeks. Just when that occurred, I don't know, but it happened very infrequently.

Q. Would they occasionally send down personnel, send down—I mean to have come into the District of Columbia—personnel for the purpose of making any research or survey or doing any work independent of your office, although you might know they were here? A. Yes, that has happened, but it happened during—whether it happened during that year or not, I don't know; but they would be engaged purely

in patent work, in making patent investigations on some problem that they would particularly be concerned with, and use my office only as a headquarters.

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102 Thereupon,

JAMES P. VEACH

being first duly sworn, testified upon his oath as follows:

DIRECT EXAMINATION

BY MR. ZELLER:

Q. Please state your name and address for the record. A. James P. Veach. I reside at 3130 North 19th Street, Arlington, Virgina.

Q. What is your occupation, Mr. Veach? A. I am manager of the Washington office of the Washington Frequency Bureau.

Q. Where do you have your office? A. 1625 K Street.

Q. How long have you held that position? A. Since the office was established in 1945.

THE COURT: How long have you held it?

THE WITNESS: Since 1945.

BY MR. ZELLER:

Q. Will you tell us what the functions of your office are? A. The RCA Frequency Bureau advises the RCA divisions and subsidiaries of the use and assignment of frequencies. We also obtain—

THE COURT: Frequencies granted by whom?

THE WITNESS: Radio frequencies granted by
103 the Department of State, Federal Communications Commission, in some cases even the Military. We obtain those licenses as well.

BY MR. ZELLER:

Q. Would you tell us a little bit, Mr. Veach, about how this matter of frequencies affects RCA's business? A. Well,

all operations by RCA are primarily radio, Marine, and RCA communications and the National Broadcasting Company, require the use of frequencies in order to broadcast or carry on their business. We advise them regarding the use of such frequencies and obtain licenses for such uses.

Q. By whom are such uses granted? A. Federal Communications Commission of Department of State.

Q. Will you tell us whether or not you have any responsibilities in connection with the sales of products that are manufactured by RCA? A. None whatsoever.

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104 Q. What was the size of your office staff during this period? A. Normal complement that it was during these years was three men and three women.

Q. And what was the position of these three men? A. Mr. Siling is the Director of the Bureau and I am the manager of the Bureau and we have an assistant manager.

Q. What function do these three ladies serve? A. We have an administrative assistant and two secretaries.

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CROSS EXAMINATION

BY MR. WIXON:

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105 Q. Do you have, from time to time, occasion to have persons come into your offices who are employees or officers of the Radio Corporation of America for the purpose of proceeding with some particular matter through your office or independently of your office? A. On occasions, yes.

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109 Q. Have you obtained any frequencies for the District of Columbia? A. We do not obtain frequencies for the Federal Government.

Q. I did not mean for the Government.

THE COURT: For any broadcasting station?

THE WITNESS: Yes, the National Broadcasting Company operates broadcasts, FM, and television stations here.

BY MR. WIXON:

Q. Is that a part of the Radio Corporation of America? A. Yes.

Q. It does business here, sir? A. As far as I
110 know.

THE COURT: Is that a separate corporation, the National Broadcasting Company? Do you know whether it is?

THE WITNESS: I don't know.

MR. ZELLER: I am not familiar with the procedure, but I would think that that would be an appropriate matter for counsel to respond to.

I can say that it is a separate corporation.

* * * * * * * * * *

Q. This is a separate function, the one you have, from the four operating departments of the corporation, is that true, sir? A. Yes.

Q. And the Frequency Bureau is a separate organization or department or activity of the Radio Corporation of America? A. It is a Bureau of the Laboratories Division.

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111 Thereupon,

ALLEN BUXTON MILLS

being first duly sworn, testified upon his oath as follows:

112 DIRECT EXAMINATION

BY MR. ZELLER:

Q. Please state your name and address for the record.

A. Allan Buxton Mills, 100 Jefferson Avenue, Haddonfield, New Jersey.

Q. What is your occupation, Mr. Mills? A. I am the merchandise manager for the television division of the Radio Corporation of America.

Q. Where is your office located? A. In Camden, New Jersey.

Q. How long have you been with RCA? A. I am in my 32nd year of employment with the corporation.

* * * * * * * * * * *

113 Q. During these years, 1949, '50 and '51, what was your position? A. I was General Sales Manager for the Home Instruments Department of the Victor Division of the Radio Corporation of America.

Q. And will you tell us what your responsibilities in that position were with particular reference to sales to customers located in the District of Columbia? A. My responsibilities were to arrange for the quarterly sale of the output of our factories in those products with which I was concerned, and to oversee the sales activities of our distributors throughout the nation, and of course in the District of Columbia as well.

Q. Now, will you tell us to whom sales made by RCA to customers located in the District were actually made? A. We made sales to our wholesale distributor, the Southern Wholesalers, Incorporated. During that period, we made some trifling sales to the Fairfax Distributing Corporation.

Q. You say "trifling sales", Mr. Mills. What would be the comparison in percentage terms between terms to Southern Wholesalers on the one hand and sales to Fairfax on the other? A. I would say not exceeding one per

114 cent; one per cent, probably less.

Q. What were the terms upon which the Home Instrument Department sold goods to Southern Wholesalers? A. We sold f.o.b. our plant, that is, f.o.b. our fac-

tories which were the shipping points with shipments from the first to the middle of the month due for payment the end of the month, and from the middle of the month to the end of the month due for payment the middle of the following month.

Q. Can you tell us whether or not Home Instruments Department ever made sales on consignment to any customer located in the District? A. During the taxable years? We made no sales on consignment.

Q. Who was the field sales representative in whose territory the District of Columbia fell? A. Morton Polikoff.

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115 Q. Will you tell us, Mr. Mills, whether any employee of the Home Instruments Department, to your knowledge, maintained an office in the District of Columbia during these years? A. We maintained no office in the District of Columbia.

THE COURT: Any employee of the organization—did any employee of the organization maintain an office?

THE WITNESS: No employee of the Home Instrument Department maintained any office in the District of Columbia.

BY MR. ZELLER:

Q. Can you tell us whether or not any employee of the Home Instruments Department resided in the District of Columbia during this period? A. No employee resided in the District of Columbia so far as I know.

THE COURT: That is all he is asking you, of your own knowledge.

BY MR. ZELLER:

Q. Now, did any RCA employee or agent other than employees or agents of Home Instruments Department have any responsibility for sales of products manufactured by Home Instruments? A. No.

Q. Can you tell us whether or not any sales were made of Home Instruments products by any non-Home
116 Instruments employee during these three years? A. None were.

Q. Now, will you describe to the Court the method by which sales were made by Home Instruments Department to Southern Wholesalers during these three years? A. The Home Instruments Department followed what we call our DQA system of selling, which means that for each quarter of the year we would determine in Camden the percentage of our total output which we felt should reasonably be handled by our customers in areas which they served, and develop then for each of our customers a suggested quantity of merchandise to be moved by that customer in his area during the quarter.

THE COURT: That does not answer the question. He wants to know how he proceeded to sell it.

BY MR. ZELLER:

Q. Carry it on through the chain of events leading to the actual sale, Mr. Mills. A. Very well. Those figures having been prepared, would then be given to our sales representative who would contact the customers whom he served and he would then negotiate with them the acceptance of their responsibility, let's say, for the movement of this quantity of goods.

Thereafter, as factories produced merchandise, our
117 sales administration section in Camden would notify our customers what merchandise was scheduled for shipment to them that particular week. That was a regular recurrent activity each week, that notification of the goods ready for shipment would be sent to each customer and in the absence of any objection from the customer, the goods would normally be shipped and billed in the ordinary course of business.

Q. Did you have any policy during these years regarding the point at which in this distribution chain which you have described the sale to the customer became a firm sale? A. The sale was actually not a firm sale until the goods had actually been shipped.

In other words, the customer could refuse shipment at any time prior to the time that shipment actually had been made.

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118 Q. Now, how were field sales representatives compensated? A. By salary.

Q. Was any provision made in their compensation for commissions? A. There were no commissions.

Q. By whom were the Home Instruments field sales representatives paid? A. By the RCA Victor Division of Radio Corporation of America.

Q. And from what office of the Victor Division? A. From the Camden office.

Q. One thing I think may not be entirely clear on the record with respect to your DQA system of doing business.

When did you at Camden consider, at what point in the negotiation of the DQA did you in Camden consider that the amount to be shipped to the customer for that quarter had been arrived at?

MR. WIXON: Objection.

119 THE COURT: I will sustain that. It does not make any different what he considers. He has already testified that the procedure was this, that they determined how much the customer should take, the representative called on them and told them what they had to take, and that a week before shipment was made, they notified the customer and if they didn't hear any objection, it was shipped to them f.o.b. Camden. That is a point already gone into. Am I wrong in that or not?

THE WITNESS: That's correct, Your Honor, excepting you said "f.o.b. Camden."

THE COURT: F.o.b. the plant.

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120 CROSS EXAMINATION

BY MR. WIXON:

Q. Mr. Mills, in your sales of your product to the Southern Wholesalers, were such sales made on an agree-
121 ment between Southern Wholesalers and the Radio Corporation of America for the distribution of its product by that particular Southern Wholesalers? A. If I understand your question correctly—

Q. If you don't, I will be glad to restate it. A. We appoint distributors to handle our product and by virtue of that appointment, there is a mutual agreement, I would say, that we are going to sell them goods and they are going to buy goods.

Q. Is there any restriction on such an organization geographically? That is to say, if they are accepted as a distributor for the Radio Corporation of America's products, that their distribution shall be confined to any particular area?

MR. ZELLER: I object to that, Your Honor. It is far beyond the scope of the direct. I do not think so. He has attempted to tell the manner in which he is disposing of their property.

He is telling of the manner in which Southern Wholesaler is disposing of this property.

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122 THE COURT:

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You have your objection.

Mr. Mills, you will have to answer that question: Whether or not your distributor in the District of Columbia had exclusive rights within the District of Columbia.

THE WITNESS: We sold to no one else within the District of Columbia, excepting these sales I mentioned to the Fairfax Distributing Company.

* * * * * * * * * * *

126 Q. In respect of your distributors, were they confined by agreement with the Radio Corporation of
127 America to any particular territory or area in disposing of the products handled by them? A. We recommended to them that they confine their operations to an area with which they were fully familiar and in which they were located. There was nothing other than a recommendation.

Q. That recommendation—was that recommendation in writing? A. I believe that when we appoint a distributor we outline for him the area to which we recommend that he confine his selling activities.

Q. If he transgressed and attempted to go over in areas beyond that which you recommended, would he lose his distributorship or franchise? A. No.

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Q. Mr. Mills, how do you appoint a distributor?
128 A. By this letter that I mentioned.

Q. Is there an application made? Do you have a day set for considering the applications of a number of persons to obtain a franchise? What are the mechanics of an appointment of a franchise operator or dealer? A. There is, when it becomes necessary to appoint a distributor, there is an investigation carried on. There is mutual negotiation between our various sales people and individuals who might

be interested in handling our products in the area in which they are situated, and out of those negotiations and investigations eventually comes a decision which is evidenced by this letter appointment that I referred to.

Q. Is there a formal contract entered into between the corporation and the distributor? A. There is no formal contract.

Q. This letter then would constitute the appointment, is that right, sir? A. Yes.

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129 Q. Now, Southern Wholesalers was the appointed distributor of your products, I understand, during these years and was he appointed during these years? Was he the appointed distributor? A. He was the appointed distributor during these years.

Q. And did that company obtain any product that the corporation produced or manufactured by a department other than the Home Instruments Department to your knowledge? A. Yes.

Q. And from what department did it obtain products? A. It obtained products from the Record Department, from the Tube Department, in addition to the Home Instruments Department; in addition to the Home Instruments Department.

THE COURT: Mr. Mills, in connection with that testimony, were television sets manufactured and sold by the Home Instruments Department? A. Yes, Your Honor.

THE COURT: I understood you to testify earlier
130 in your testimony that there was a Television Department. I am a little confused.

THE WITNESS: The Television Department is an outgrowth of the Home Instruments Division by virtue of a split-up of the activities of the Home Instruments Division which has taken place quite recently.

THE COURT: That clears it up.

BY MR. WIXON:

Q. Does the Radio Corporation of America, or did it, during these years in question, advertise its product locally? When I say "advertise," you understand I am referring to the usual media for advertising, such as newspapers, radio broadcasts, magazines and advertisements and the like. A. Advertising by the Radio Corporation of America was so-called national advertising. We would run ads in the national magazines which, of course, would appear in the District of Columbia. There would be occasionally times when the corporation would advertise across the nation in newspapers. I wouldn't know definitely whether a newspaper campaign had been run during those years or not. It is possible that it might have.

Q. Did you contribute to the advertisement of the Southern Wholesalers for the merchandising of RCA products? A. We make available to our distributors a fund called a cooperative advertising fund to which we and they
131 contribute to be used for various sales promotional purposes by our distributors.

Q. Do your officers and employees visit the distributors for the purpose of advising them and counselling them and assisting them in the distribution of your products? A. A field representative would visit with Southern Wholesalers and advise them in the selling and merchandising of our product.

Q. Where was he located during the years we are speaking of? A. Our representative lived during those years in Philadelphia and operated out of the Camden office.

Q. When he would come to Washington, would he use any of the office space, to your knowledge, which had been acquired and was in use by various operating sections of the corporation? A. No, he would not.

Q. He would never go near those offices? A. Probably not.

Q. Do you know whether he did in fact use those facili-

ties? A. I know that he did not, in fact use those facilities in any way in connection with his business.

Q. Was he prohibited from so doing? A. Why, he
132 wouldn't be prohibited from going into an office and using a telephone or something of that sort, but there was no part of his activity which had anything to do with any of those offices.

135 Do the contractors and did Southern Wholesalers at any time call for assistance and help of the Radio Corporation of America in its dealings, its merchandising of the products of the Radio Corporation of America?

THE COURT: During the taxable years.

MR. WIXON: I understood your Honor to observe that.

THE COURT: I want the witness to understand it, too.

THE WITNESS: I don't understand what you mean by "call for help." There was continuing communication between our distributors, Southern Wholesalers, and our offices in Camden with respect to the sale of the product. It was a day-to-day routine undertaking or happening.

Q. What are the products manufactured by the Home Instruments Department? A. Television sets, radio sets, phonographs, and various combinations.

Q. Do you manufacture any cooking items? A. No.

Q. Stoves or any of those appliances? A. No.

Q. I take it, also, that there are sales of records and things of that sort, but they come out of the Victor Division of the Department, do they not? A. The Home Instrument Department has nothing to do with the sale of records.
136 The sale of records is handled by the Record Department.

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140 REDIRECT EXAMINATION

BY MR. ZELLER:

Q. Now, Mr. Mills, after the DQA is first made up in Camden, and turned over to the sales representatives, what

does the sales representative do with it, if you know? A. The sales representative discusses it with the distributor, comes to a mutual agreement with him, either that the quantities lined out are satisfactory for the period involved, or
141 if they are not satisfactory changes that are mutually agreeable are made, and this DQA then becomes, let's say, the mutually agreed upon schedule of merchandise against which our weekly shipments are made.

Q. After this period, or after this point of mutual agreement, what happens to the DQA then? A. It would be on file in our office.

Q. That is, it comes to Camden; is that correct? A. It comes back to Camden.

* * * * * * * * * *

Thereupon,

MARTIN POLIKOFF

being first duly sworn, testified upon his oath as follows:

142 DIRECT EXAMINATION

BY MR. ZELLER:

Q. Is 4418 Spruce Street your residence, Mr. Polikoff? A. Yes, sir.

Q. What is your occupation? A. I am field sales representative for the Television Department of the Radio Corporation of America.

Q. Where is your office located? A. Camden, New Jersey.

Q. How long have you been with RCA? A. Since July 1945.

Q. Would you summarize for us your position held since that time? A. I have been field sales representative of the Home Instruments Department and upon the split of the department in September of the past year, field sales representative for the Television Department.

Q. What products were handled by you as field sales representative? A. Television, radio and Victrola phonographs.

Q. Can you tell us whether or not there was a territory assigned to you? A. Yes, sir, there was.

Q. Would you describe for the record that territory? A. It was eastern Pennsylvania, southern New Jersey,
143 Delaware, Maryland, District of Columbia, and parts of Virginia.

Q. Now, during the years in question, '49, '50, '51, what did you use as the base of your operations? A. My home and reporting to the Camden office on occasion.

Q. About how often would you say that you reported to Camden during these years? A. About twice a month.

Q. Will you tell us how your compensation was computed? A. I operate on a salary basis with an incentive bonus arrangement based on the over-all profits of the Radio Corporation of America.

Q. Can you tell us whether or not you handled any other products than those manufactured by the Home Instruments Department? A. No, sir; I did not.

Q. Well, will you tell us the companies located in the District of Columbia to whom sales of Home Instruments products were made during these years? A. Southern Wholesalers, Inc. and Fairfax Distributing.

Q. Mr. Mills has told us in general the operation of the DQA system, Mr. Polikoff, and will you tell us how you operated under that system with reference to sales to Southern Wholesalers?

144 MR. WIXON: That presupposes that he is familiar with it.

MR. ZELLER: I will ask the foundation question.

MR. WIXON: I do not know what DQA really means, myself.

MR. ZELLER: To enlighten counsel, Mr. Mills defined it as standing for Distributors Quarterly Acceptance.

THE COURT: I am glad you did, because I did not know what it meant either.

MR. WIXON: For one time, I was on sound ground.

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BY MR. ZELLER:

Q. Will you tell us what the initials DQA stand for? A. They stand for Distributors Quarterly Acceptance.

Q. And will you tell us how you made sales during these years in question to Southern Wholesalers, please? A. The basis was the Distributors Quarterly Acceptance which represented what we considered his market percentage of our total production during a given quarter.

THE COURT: Go on. He wants you to tell how you made the sales.

THE WITNESS: And it was my practice, of course, to contact Southern Wholesalers on a quarterly basis. Twice a year I would invite them in to Camden, those periods being just in advance of the third quarter of the year, and just in advance of the first quarter of the ensuing year.
145 They would come in to Camden for the purpose of viewing new merchandise that we introduced at those times.

BY MR. ZELLER:

Q. Now, can you tell us whether any orders were received from Southern Wholesalers during these years on any basis other than the DQA basis? A. There were supplementary orders given from time to time, depending upon the availability of merchandise or their desire for additional goods, if it were possible for them to secure it by virtue of us being able to increase production.

Q. How does the volume of goods purchased on these supplemental orders by Southern Wholesalers compare percentagewise with the volume of goods purchased by them on the DQA? A. They would be relatively small.

Q. Can you define that in more exact terms? A. I would say that they probably would not exceed 10 to 15 per cent of the original amount of the goods offered on the quarterly acceptance form.

Q. So that the record will be clear, Mr. Polikoff, what I would like to do is to start from the point at which you get the DQA in Camden and tell us exactly what you did during these years, what your practice was in going to Southern Wholesalers and discussing it with them.

THE COURT: Also pay attention to the locale,
146 where the things took place.

THE WITNESS: I will approach this with the most important part of the activity which was immediately prior to the beginning of the second half of the year, or that quarter that we designated as the third quarter.

At that time of the year we introduced a complete new line of goods and it was my practice to bring Southern Wholesalers in to Camden to review the goods with me, our sales promotional campaign to help move that goods, and to negotiate the DQA while we were in Camden.

The same thing happened for the first quarter of the following year which would take place some time between the first or maybe fifteenth of December and the same procedure would take place.

In other words, I would sell them the merchandise for the third quarter in Camden and likewise for the first quarter of the following year, in Camden.

Other period of the other quarters, the first and—I mean the second and fourth quarters of the year, I would negotiate with the distributor the quarterly acceptance in Washington.

BY MR. ZELLER:

Q. You started off by saying that you would start with the most important point and telling us you were starting with the third quarter, would you tell us what the

147 basis for that was? A. That is the beginning of the most important selling time in our industry. That is the preparation for the last half of the calendar year and traditionally the greatest volume of business is done from July to December 31.

Q. During the period in question, how would the size of the quarter on the third quarter DQA compare with the size of the orders on the DQA for the other three quarters?

MR. WIXON: Objection. Completely irrelevant.

MR. ZELLER: I don't think it is irrelevant at all. The witness has testified that the third quarter DQA was negotiated in Camden and I want to bring out the size of that in comparison with the others.

THE COURT: I don't know how important it is, but it may be and I will overrule the objection.

* * * * * * * * * * *

THE WITNESS: It would be the largest part of the total year's volume of business.

THE COURT: In other words, the largest quarter was the third quarter?

148 THE WITNESS: The third quarter.

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BY MR. ZELLER:

Q. Now, tell us how these supplementary orders were worked out from Southern Wholesalers? A. Do you mean how I obtained them?

Q. Yes, sir. A. In most cases they were negotiated over the telephone because Southern Wholesalers were already familiar with the merchandise that was being offered to them.

THE COURT: What do you mean "negotiated?"

THE WITNESS: And that would be from either the office or my home.

BY MR. ZELLER:

Q. Without using the word "negotiated" tell us what happened, Mr. Polikoff, in these telephone conversations.

MR. WIXON: I object, Your Honor.

THE COURT: On what ground?

MR. WIXON: I would like to have identified a con-
149 versation for we have a generalization of a number of them. I can't do much with that. I don't know who made the call.

THE COURT: What is sought to be brought out is what happened when they ordered this additional merchandise. Just tell us what happened.

THE WITNESS: I would call them on the phone and offer them a certain amount of merchandise that might be in one model, or it might be divided over several models. They would either accept or reject the total quantity or take any part thereof that they wished.

THE COURT: Where were you and where were they?

THE WITNESS: They were in their offices in Washington, D. C., and I might have been at my home in Philadelphia or in the office at Camden.

THE COURT: All right.

BY MR. ZELLER:

Q. About how many times a year during this period did you come to the District of Columbia? A. I would say twelve or fifteen times a year.

Q. Of those twelve or fifteen visits, on how many occasions did you discuss the DQA with the distributor? A. No more than about twice.

. . . . . .

150 Q. During these trips to Washington, did you ever make use of any of the office facilities of offices maintained by RCA in the District? A. No, sir, I never did.

. . . . . .

Q. Now, on these occasions of your visits to Washington, where you did not discuss the DQA because it was not up, what did you and the distributor discuss? A. Routine business, such as movement of merchandise, advertising and sales promotion programs, sales training of their personnel and/or dealer personnel, dealer visitations made with
151 their Southern Wholesalers sales personnel or executives.

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152 CROSS-EXAMINATION

BY MR. WIXON:

Q. Mr. Polikoff, did you happen to have occasion during these years we are speaking of to visit Fairfax Distributing Corporation? A. Not in those years, no.

Q. They were dealers for your products, were they not? A. Fairfax was a distributor of our product; yes, sir.

Q. I believe you testified you came to the District of Columbia probably a dozen times or so during these years? A. Yes, sir.

Q. And that you visited the Southern Wholesalers Company on several occasions during those visits. That is to say, you went to see them two or three times out of the dozen or so visits you made? A. No, no. I would see them
153 on each of my visits here.

Q. Was that your purpose particularly in coming here? A. Not particularly.

Q. You came here to observe the over-all distribution of the product? A. Yes, sir.

Q. How long did you stay on each one of those visits? A. It would vary from a matter of a day to three or four or maybe five days.

Q. Did you go out with the salesmen for the Southern Wholesalers? A. Yes, sir.

Q. What did you do when you went out with them? A. I would help train them in the sale of our merchandise, help them train the dealer in the sale of the merchandise. I would aid the distributor salesmen in aiding the dealer in the sale and promotion of our goods.

Q. Did you take any orders for merchandise on your visits to Southern Wholesalers? A. I did not, no.

Q. Did you take them for relaying to anyone? A. Would you kindly repeat that?

Q. I asked you if you would take any orders for
154 merchandise? A. From or for?

Q. From, for Southern Wholesalers. A. I did not personally.

Q. Did you take any orders for anybody else? A. I did not.

Q. Did you relay any orders which might have been placed by Southern Wholesalers of some other organization to the main office or the office from which you operated? A. No, sir.

Q. Did you make arrangements for the taking of orders? A. No.

Q. Did you enter into agreements for the sale of merchandise to the Southern Wholesalers? A. No.

Q. I believe you said you came down here with the express purpose from time to time of determining the amount of merchandise which the Southern Wholesalers people would require in their operation; is that a fact? A. Yes, sir.

Q. Did you ascertain what they might be expected to require in the course of their operations on your visit to them? A. Yes, sir.

Q. Wasn't that one of your major purposes as the
155 representative, sales representative, to ascertain what by way of merchandise should be required, what would be required, rather? A. I would say that would be one of my important functions.

Q. The sale of merchandise was your primary function, was it not? A. I would say so; yes, sir.

Q. Who, if anyone, handled the matter for Fairfax Distributing Company? A. During the years in question, I don't know.

Q. Somebody did but it was not you; is that it? A. That is right.

Q. What type of products did they purchase from the company, if you know? A. Radio only.

Q. Radios? A. Yes.

Q. Did that include the component parts, records which might be played on a record player, and things of that sort? A. Not to my knowledge.

Q. Did you ever have occasion on your visits to Southern Wholesalers to arrange for the return of merchandise
156 to the Radio Corporation of America? A. No.

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Q. In your discussions with representatives of Southern Wholesalers, was it your purpose to determine how much merchandise the distributor would require in addition to that which had been given to him on a DQA? A. Yes, sir.

Q. Did you sell him or attempt to sell him additional merchandise from time to time? A. Yes.

Q. In other words, you solicited him to buy merchandise over and above that which he had already purchased; is that right? A. If such merchandise was available; yes, sir.

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157 REDIRECT EXAMINATION

BY MR. ZELLER:

Q. At the outset of the cross-examination, Mr. Polikoff, I believe you may have misspoken yourself. Can you tell us whether you came down to Washington a dozen times or so during these three years or during each of the three years? A. I would say during each of the three years.

Q. On another occasion counsel was examining you with respect to your visits to retailers here in the District of Columbia, and I believe you testified as to whether or not you took orders for or from Southern Wholesalers. Did you mean your testimony on that occasion to be as to whether you had taken orders for or from Southern Wholesalers in connection with those visits to retailers? A. I thought I had made that point clear that I did not solicit business from any dealers at the time of my visits. That was the function of Southern Wholesalers' representative.

MR. ZELLER: That is all.

RECROSS-EXAMINATION

BY MR. WIXON:

Q. I believe you said you went out with the sales representatives of Southern Wholesalers and that you
158 went with them to the outlets of Southern Wholesalers for their Radio Corporation of America products. That is to say, they were the persons from whom they got orders? A. Yes.

Q. What did you do when you went to these retail establishments? I take it they were all retail establishments. A. Yes, that is correct.

Q. What was your purpose in going to see the merchandisers? A. Having a superior knowledge of the product, I would go into probably greater detail with regard to the product and its sale ability in aiding Southern Wholesalers representatives in consummating a transaction with the dealers.

Q. In other words, you were there in a capacity, or acting in a sense not only for the Radio Corporation of America but for Southern Wholesalers in an attempt to sell on behalf of Southern Wholesalers merchandise which it had for sale? A. I would say in an advisory capacity.

Q. You answered questions from the retailers regarding the merchandise offered for sale? A. Yes.

159 Q. You stated the advantages to be gained from purchasing any equipment or some other commodity with which you might be familiar? A. Yes.

Q. Would it be correct to say that your efforts were directed to supplementing and to aiding in the sale of merchandise of the Radio Corporation of America through Southern Wholesalers? A. Yes, sir.

* * * * * * * * * * *

160 THE COURT: What was the character of the Southern Wholesalers business? Was it a distributor or a jobber or what?

THE WITNESS: They are wholesale distributors of our product.

THE COURT: What is the difference between a distributor and a wholesaler or a jobber?

THE WITNESS: A wholesaler sells to dealers.

THE COURT: What does a distributor do?

THE WITNESS: A distributor serves the same function. It might be just another name.

THE COURT: Would you answer that there is no distinction between them?

THE WITNESS: I would say that there is no distinction between a wholesaler and distributor.

THE COURT: What other products besides yours did Southern Wholesaling Company sell?

THE WITNESS: Refrigerators and ranges and washing machines.

THE COURT: Did they sell any competing radio and television equipment?

THE WITNESS: No.

161 THE COURT: Was that in their contract that they should not sell?

THE WITNESS: No.

THE COURT: Was that their understanding?

THE WITNESS: No.

THE COURT: You did not limit it to that?

THE WITNESS: No.

THE COURT: Did any of your distributors or wholesalers sell other products besides the products of the Radio Corporation of America?

THE WITNESS: That I do not know.

THE COURT: I mean in your territory.

THE WITNESS: In my territory I would say no.

THE COURT: When you convinced the Southern Wholesalers Company, or they convinced you, that they ought to have additional equipment or material or products, what did you do? Did you take an order?

THE WITNESS: Yes, I would take an order subject to our ability to ship against it.

THE COURT: In the ordinary course of business you would take an order that was approved some place else, or did you approve it?

THE WITNESS: No, I did not approve it. It would be approved in Camden.

THE COURT: But you solicited specific orders?

162 THE WITNESS: If I had information to the effect that there might be merchandise available, then I would solicit.

THE COURT: Was it in writing?

THE WITNESS: They would give it to me in writing at times or they might make it verbal.

THE COURT: You don't know anything about Fairfax?

THE WITNESS: Oh, I know of them. During the years we are talking about, I had no contact with them.

THE COURT: Do you know how they got material and who solicited them?

THE WITNESS: I do not recall during the years in question who particularly might have solicited their business.

MR. WIXON: In view of your Honor's questions, might I ask this?

THE COURT: Yes.

BY MR. WIXON:

Q. On all these occasions when you talked with the Southern Wholesalers, do I understand they never gave you an order for any merchandise?

THE COURT: He said he did not take orders.

MR. WIXON: On my examination he told me he never got any orders.

MR. ZELLER: That was the point I tried to clear
163 up on redirect examination. I think the witness misunderstood your question. He was thinking in terms of these visits to retailers and you will recall that was the line of examination.

You may recall, Mr. Wixon, it was brought out on direct examination, too, that he did come down here and take orders two times a year in the DQA and occasionally on these supplementary matters.

THE COURT: It is cleared up now.

MR. WIXON: Yes, it is.

THE COURT: The way I thought the witness understood it was that when he went on visits to the retailers, did he receive any orders for the Southern Wholesalers.

MR. WIXON: I understood him to say no, he did not take orders from retailers.

THE COURT: I understood that, but he does take orders from the Southern Wholesalers to the Radio Corporation of America.

BY MR. WIXON:

Q. Is that correct? A. Yes, sir.

Q. You accepted orders?

THE COURT: He did not accept the orders. The orders were taken at Camden.

164 BY MR. WIXON:

Q. During the years in question? A. Yes.

* * * * * * * * * *

BY MR. WIXON:

Q. With respect to Fairfax, was there another sales representative who covered the same territory that you had? A. No, but there was a special assignment made to an individual to contact Fairfax.

Q. Do you know the reason for that? A. No, I do not.

Q. Was he an officer or an employee of the Radio Corporation of America? A. He was an employee.

Q. Was he under your supervision? A. No, he was not.

Q. Was this a usual occurrence?

MR. ZELLER: I object, your Honor. It is not ma-
165 terial.

THE COURT: I think it is very important. It is something that has not been explained yet.

BY MR. WIXON:

Q. Was it a usual occurrence? A. I don't know.

Q. Was it usual in your experience to have a distributor in your territory or the territory assigned to you to be serviced by somebody not under you who was not under your direction or control, or who did not operate with your knowledge? A. It could happen.

Q. Was it usual? A. That I do not know, sir.

THE COURT: He did not ask you whether it could happen or not. Anything can happen.

THE WITNESS: That is for sure.

THE COURT: He asked you: Did it happen?

BY MR. WIXON:

Q. Did it happen? Was it usual for these things to occur in a territory serviced by you that a distributor within your territory would be serviced by some individual not under your control and not under direction and without your knowledge? A. This happens to be an unusual case.

Q. Do you know the name of the gentleman?
166 A. I do not recall.

. . . . . .

168 Whereupon

HAROLD F. BERSCHE

was called as a witness on behalf of the petitioner, and, having been first duly sworn, was examined and testified as follows:

THE COURT: Give your name and address to the stenographer, please.

THE WITNESS: Harold F. Bersche.

My home address is 18 Erskine Drive, Morristown, New Jersey.

DIRECT EXAMINATION

BY MR. ZELLER:

Q. What is your occupation, Mr. Bersche? A. I am manager of Marketing Services, the two divisions of the Radio Corporation of America.

Q. Where is your office located? A. Harrison, New Jersey.

Q. How long have you been with the Radio Corporation of America? A. Going on eleven years.

Q. Will you tell us whether or not during those eleven years you worked as a liaison in the general field of sales? A. For the entire time up to the first of this past January.

169 Q. What changes occurred since that time? A. I was appointed to my present responsibilities, my present job.

Up to that time I was—let me back up. Up to January 1, 1948 I was District Manager, Southern California District. I was then made National Field Force Manager on January 1, 1948. On January 1, 1949 I was made Renewal Sales Manager, again of the two departments at that time of the Radio Corporation of America.

Q. Will you tell us what products are manufactured and sold by the two departments? A. Tubes, that is, receiving tubes, power tubes, picture tubes for television, transistors and other matters classified as tubes, batteries, component parts and accessories.

Q. Will you tell us how sales of your tube department products are handled from an organizational standpoint, and when I say how they are handled I mean during these three years of 1949, 1950 and 1951? A. During the three years in question there was a division in the sales responsibility. There were two organizations. One was called the Equipment Sales Operation, whose principal respon-
170 sibility was to sell the products to manufacturers and the government. Then there was the Renewal Sales Operation, and that group covered sales to all other customer classifications. That would be Victor Instrument Distributors, plus the independent electronic distributors, broadcast stations, and so forth.

Q. Mr. Bersche, I will ask you to assume for the purposes of your answer to the next question of mine that the books and records maintained by the tube department with regard to sales to customers located in the District of Columbia grouped the customers into the following categories: Franchise distributors, other distributors, radio stations, manufacturers, affiliated companies, miscellaneous and United States Government. Now, will you tell us what the division of those classes of customers would be as between renewal sales and equipment sales. A. Renewal would handle all classifications with the exception of government and manufacturers.

Q. Will you tell us how the field sales representatives, both of equipment sales and renewal sales, were paid? A. On a salary arrangement.

Q. Was there any commission entering into the fix-
171 ing of their compensation? A. No commission.

Q. To what office did those sales representatives

report? A. Both groups reported to Harrison, New Jersey.

Q. Will you just concentrate for a moment on the Renewal Sales Branch. What territory of the Renewal Sales Branch included the District of Columbia for the purposes of field sales representation? A. Northern Virginia, Maryland, Delaware, Southern New Jersey and the eastern half of Pennsylvania.

Q. How many field sales representatives of Renewal Sales handled that territory that you have mentioned? A. One.

Q. How often did the field representative handling renewal sales to customers located in the District of Columbia visit the District of Columbia?

MR. WIXON: I object. That person would be the one most qualified to testify.

THE COURT: If he knows.

MR. WIXON: How could he know except by hearsay, your Honor?

THE COURT: I will overrule the objection. He can testify. He would know.

MR. WIXON: May I say this, without tending to
172 argue further: He could know that somebody started. He would not know that the man actually got here or that the man did not come here on intermediate times within his knowledge.

THE COURT: I think a man could know how frequently his agents cover the territory. I will overrule the objection.

THE WITNESS: They are required to report——

THE COURT: Wait a minute.

THE WITNESS: —report every six weeks or seven weeks.

THE COURT: The question is how often, if you know, did the agents come to the District of Columbia.

THE WITNESS: Every six or seven weeks and it may sometimes, on occasion, stretch out to eight weeks.

* * * * * * * * * *

175 THE COURT: You seem to be obsessed by patterns. We want to know what happened during these three years. Were they made by an agent? Did he come to the District? Did he get an order and send it back from the District of Columbia? That is what he wants to know and what I want to know.

THE WITNESS: We sell several distributors in the District of Columbia. There might be an occasion when the order would be handed to the salesman. That would be pure coincidence if it did.

THE COURT: I am talking about sales in 1949, 1950 and 1951.

THE WITNESS: That is right. It would come directly to the company, to the headquarters, to the serving warehouse, in fact, and not to the company in Harrison.

176 In flow type selling, we do not intentionally solicit. That is the thing we try to keep from.

THE COURT: Maybe it is my fault. Counsel asked you what happened here in the District of Columbia during those three years; how were those sales made? Were they made by a representative coming into the District of Columbia?

THE WITNESS: One representative, Mr. Vic Williams, who resided in Philadelphia and covered this territory that I just previously outlined.

THE COURT: Did he solicit orders in the District of Columbia?

THE WITNESS: No, not any more than he would any place else.

THE COURT: Of your own knowledge?

THE WITNESS: His primary purpose was to work with the distributors in a counseling capacity to administer our promotional activities. If he solicited an order, I would not know about it.

. . . . . .

177 BY MR. ZELLER:

Q. Can you tell us how often the equipment sales representative came to the District of Columbia during these three years?

MR. WIXON: I object.

THE COURT: I think he can testify to that. You mean other than the renewal?

MR. ZELLER: Yes, sir; there are two different fellows.

THE COURT: I understand.

THE WITNESS: The frequency would be about the same as the visits of the renewal salesmen. They tried to keep the work load evenly divided.

MR. WIXON: May he state it so that we will know what he is talking about.

THE COURT: He said every six weeks and sometimes it might be eight weeks would elapse.

BY MR. ZELLER:

Q. Can you tell us how sales of the two department products were made to the United States Government for shipment into the District of Columbia? A. Yes.

Q. Will you describe it, please? A. Well, it is a 100 per cent bid activity. If we had the lowest price and the proper delivery required by the government, we could get the

178 business. If we do not, we do not.

THE COURT: In other words, whenever they needed equipment, you bid on it within your line?

THE WITNESS: Oh, yes. You bid on all articles that you manufacture that have been approved by the Army and the Navy for use in their equipment, and it is published. There is a published book outlining that by type.

BY MR. ZELLER:

Q. Where are those bids prepared, or by whom, if you know?

MR. WIXON: I object to that, your Honor. He is talking about the bid, itself, I suppose, and the bid form is the government bid.

MR. ZELLER: Oh, no.

MR. WIXON: Are you speaking about the submitted bid?

MR. ZELLER: Yes, indeed, the bid made by the Radio Corporation of America.

THE COURT: Yes. I will overrule the objection. I think he withdrew the objection.

THE WITNESS: That is done in Harrison, New Jersey.

BY MR. ZELLER:

Q. Can you tell us whether or not during the years 1949 and 1950, taking just those two years, the two departments maintained any office within the District of Columbia?

179 A. They did not.

Q. Can you tell us whether there came a time after 1950 when the two departments did open an office?

THE COURT: That is not material, is it?

MR. ZELLER: I think it is, your Honor, because I would then go on to show, if I may, what that office consisted of. You see, it does cover one-sixth of the period in question.

THE COURT: One-sixth of it?

MR. ZELLER: Yes, there was a tube office in Washington for the last part of 1951.

THE COURT: I beg your pardon. I was a little confused about it.

MR. ZELLER: Yes, a tube department was established in Washington in May of 1951.

BY MR. ZELLER:

Q. What did that office consist of? A. A man and a secretary.

Q. What responsibilities were assigned to that man? A. Liaison between the many government purchasing agencies and the management of the tube department.

Q. Can you describe in somewhat greater detail, Mr. Bersche, by what you mean to include in the term
180 "liaison"? A. Yes.

Frequently, in special kinds or types of government equipment, perhaps under some secret classification, that equipment must be worked on and they must develop a special type of tube for that particular—that has a special application and will work in that particular equipment that we will be entitled to bid on if we can work out an application or a decision on such a product.

* * * * * * * * * * *

181 Q. Can you tell us, based on the facts which came to your own personal attention, what percentage of those orders which came from other customers than the government during these years were sent in by salesmen as compared with the number of orders which were sent in by the distributor direct?

MR. WIXON: Objection.

THE COURT: I think he ought to be able to get that testimony without having to guess at it.

MR. ZELLER: I asked him, your Honor, if you will recall, to give me the answer if he could, based on his own personal knowledge.

THE COURT: Personal knowledge by looking at something in the record, or something of that kind. I can read as well as he can, can't I?

BY MR. ZELLER:

Q. Do the orders show on their face whether or not they are voluntary orders or whether they are solicited orders? A. No.

* * * * * * * * * * *

182 BY MR. ZELLER:

Q. In the regular course of your duties, were you required to know what orders came in unsolicited in any way

and what orders came in through solicitation by salesmen?

MR. WIXON: I object.

THE COURT: I think I will sustain that objection. I do not see how in the world you can run your business without knowing whether a salesman obtained an order. You would have certain characteristics that would probably be made in the salesman's handwriting, for instance.

MR. ZELLER: That is precisely my point, your Honor. There are literally, I think, thousands of orders received at these various offices. They do not show on their face, as the witness has testified, whether or not they were solicited. All we can hope to do is to establish that through the testimony of a witness whose duty it is to know what his salesmen are doing, and that is what I propose to do if I am permitted to do so.

If I may speak just a moment more, your Honor, on this point, it is akin, the testimony I am trying to
183 elicit is akin to the exception to the hearsay rule in favor of entries made in the regular course of business. This man, in the regular course of his business, has to know what is going on and that is what I am asking him to testify to. As to this testimony, you have the same guarantee of trustworthiness as you do with respect to any records which you maintain in the regular course of business.

THE COURT: There is a rule that an estimate be made that is based on facts and if it is made by a person accomplished in that particular field—I do not think either one is shown here of an estimate made by this witness. You haven't laid any foundation for that.

MR. ZELLER: That is what I am trying to do and what your Honor has prevented me from doing by sustaining counsel's objection. I am trying to lay the foundation that this man is competent to make this estimate because he knows and has to know how these orders came to Harrison, New Jersey.

. . . . . .

185 BY MR. ZELLER:

Q. Will you tell us, Mr. Bersche, whether you have any experience which will enable you——

THE COURT: No, no.

MR. ZELLER: Let me finish the question.

BY MR. ZELLER:

Q. (Continuing) —whether you have any experience which will enable you to furnish an informed, reliable estimate as to the percentage of sales which were unsolicited versus those solicited and, if so, to state what that experience is?

MR. WIXON: Objection.

THE COURT: I will overrule the objection. First, have you had any experience?

THE WITNESS: Twenty-six years of personal selling in that field.

THE COURT: Now, what is the experience?

THE WITNESS: Twenty-six years of selling in exactly the same manner as the salesmen, not as the manager.

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187 MR. ZELLER: Very well, your Honor. I offer to prove by this witness that, based on his experience in
188 this industry, he knows that the industry follows a well-established pattern of ordering tubes, that to the extent that any order is ever given by the distributor to a salesman at the time that the salesman makes his call on that distributor, it is almost a matter of pure coincidence; that, normally, the way these distributors operate in this business, and the way they have operated throughout the twenty-six years of Mr. Bersche's experience, is to keep an inventory of tubes and when that inventory of tubes gets below a certain amount they send an order in to Harrison or to whatever company they work with and the salesmen's presence or absence doesn't have the slightest thing to do

with whether or not that order is sent in. I would further hope to prove by Mr. Bersche that his best estimate based on his years of experience in this business is that the amount of orders which came from customers located in the District of Columbia which were taken by salesmen at the time they called on those customers was almost de minimis.

* * * * * * * * * *

190 THE COURT: As far as that is concerned, I see no objection to that testimony. I do not think that lays any foundation for an estimate of what happens in the District of Columbia.

MR. ZELLER: Very well, your Honor. Let me make the record on this one thing.

* * * * * * * * * *

BY MR. ZELLER:

Q. Based on your experience, can you tell us whether it is a custom in the industry as to how orders are placed by distributors with tube manufacturers?

MR. WIXON: I object. We are not talking about
191 the industrial practice of placing tube orders, your Honor.

* * * * * * * * * *

192 BY MR. ZELLER:

Q. Confine your answer to your department of the Radio Corporation of America.

MR. WIXON: I still object.

THE COURT: I will overrule your objection at this time. All right, you may proceed.

THE WITNESS: Yes, there is because of the peculiarities of the two.

THE COURT: What is it?

THE WITNESS: Approximately 1,700 types of power tubes and roughly, there are about 830 to 840 types of re-

ceiving tubes. The business of the salesman himself writing an order would mean a complete review of an inventory which might take two days. Therefore, it is not an industry practice nor is it an RCA custom to ask the salesmen to get the order. They are trained how not to write the order at the place of business but still get the volume.

THE COURT: Counsel asked you how frequently in the business now from your experience is an order taken by a salesman as distinguished from the order sent in by the customers.

193 THE WITNESS: It is very infrequent in the New Jersey warehouse. We have got 3,800 orders in the month of November direct from customers and, while I would not testify as specifically, I would say that less than one per cent was picked up by any salesmen.

THE COURT: That answers your question.

MR. ZELLER: It does, your Honor.

THE COURT: Do you still want to proffer him as a witness to testify as to what, in his opinion, was the percentage of the business in the District of Columbia?

MR. ZELLER: Yes, sir.

THE COURT: I will sustain the objection. Do you still object?

MR. WIXON: Yes, sir.

THE COURT: I still do not think there is enough business to elicit it.

* * * * * * * * * *

194 CROSS-EXAMINATION

BY MR. WIXON:

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199 Q. Did you have a salesman in the District of Columbia during these years in question? A. A salesman covered the District of Columbia from Philadelphia.

Q. Did you have a salesman who had an office on Connecticut Avenue and occupied desk space up there? A. At no time.

Q. At no time? A. No.

Q. Then you had no person at all? A. The Tube Department had a man beginning in May of 1951.

Q. With the exception of that man commencing with that period, you had no one there? A. No.

* * * * * * * * * *

200 REDIRECT EXAMINATION

BY MR. ZELLER:

Q. I want you to forget about the tube office that was opened in May of 1951 because I think that is adequately covered by the testimony you have already given. Can you tell us whether, apart from that, there was any salesman of the Tube Department who resided in the District of Columbia during these three years? A. They did not.

Q. Was there any salesman of the Tube Department who had office space in the District of Columbia in these three years? A. They did not.

MR. ZELLER: That is all, your Honor.

THE COURT: Mr. Wixon, do you have anything further?

MR. WIXON: Yes, sir.

RECROSS-EXAMINATION

BY MR. WIXON:

Q. Did you have any representative of the Tube Department located here? A. The liaison man who was located here in the office, and I believe lived in the District of Columbia, beginning in May 1951. He was the only one.

201 THE COURT: I think you have clarified that.

MR. WIXON: He directed the question to salesman. I wanted the government representative.

* * * * * * * * * *

Whereupon

EDWARD O. WELKER

was called as a witness on behalf of the petitioner, and, having been first duly sworn, was examined and testified as follows:

THE COURT: Give your name and address to the stenographer, please.

THE WITNESS: Edward O. Welker, 57 Orchard Road, Demarest, New Jersey.

DIRECT EXAMINATION

BY MR. ZELLER:

Q. What is your occupation, Mr. Welker? A. I am manager of album development for the Record Division of the Radio Corporation of America.

202 Q. Where is your office located. A. New York City.

* * * * * * * * * *

Q. Will you summarize briefly for us your previous positions with the Radio Corporation of America Record Department? A. From 1947 until the end of March 1951 I was staff assistant to the General Sales and Merchandise Manager of the Record Department. From April of 1951 until September 1954 I was field sales representative.

Q. What territory did you cover beginning in 1951 as the field sales representative of records? A. Eastern Pennsylvania, Southern New Jersey, parts of Maryland, the District of Columbia, parts of Virginia and West Virginia and Delaware.

Q. How many predecessors were there of yours as field sales representative covering that area during the years 1949 through 1951? A. Five or six, I do not recall exactly.

Q. Are those gentlemen all with the company now, do you know. A. With one exception the man who died
203 I think in 1947 or 1948.

Q. During this 1949 to 1951 period, where was the home office of the Record Department? A. From 1947 up to early 1951 it was in Camden, New Jersey.

Q. To whom did the field representatives covering this territory report and by to whom I should say to what office? A. During that time to Camden.

Q. Did the field representatives handle the sale of products of other Radio Corporation of America departments? A. Just the Record Department.

Q. During this period, was there any field representative of the Record Department who maintained an office in the District of Columbia? A. No.

Q. Was there any field representative of the Record Department who resided in the District of Columbia? A. No.

Q. Was there any, to your knowledge, any employee of the Record Department who resided or had an office in the District of Columbia during these three years? A. No.

Q. During this three-year period to whom in the
204 District of Columbia were sales made by the Record Department? A. To Southern Wholesalers, Incorporated.

Q. Was there any other customer in the District of Columbia for the products of the Record Department? A. No.

Q. Where was the merchandise sold by the Record Department to Southern Wholesalers actually manufactured? A. Some of it was actually manufactured in Camden and some of it in Indianapolis, Indiana, and, for a short time, Cannonsburg, Pennsylvania.

Q. Can you tell us whether during this period any records were ever sold by the Record Department to Southern Wholesalers on a consignment basis? A. No.

Q. Will you describe for the record, Mr. Welker, what you did in making your calls on Southern Wholesalers dur-

ing the period when you were the field sales representative?

MR. WIXON: Your Honor, unless I misunderstood, this gentleman was not the field representative in the years in question.

THE COURT: He was.

MR. ZELLER: He was during a portion of the period.

MR. WIXON: I thought there were five or six who
205 preceded him.

MR. ZELLER: If there were five, he was the sixth, and if there were six, he was the seventh.

MR. WIXON: I misunderstood the question.

BY MR. ZELLER:

Q. Would you answer the question? A. I would review with the distributor record manager and the record manager any current matters regarding promotions, advertising campaigns. I would review the method in which they were operating internally as to how efficiently they were clearing their orders with dealers, how well they were filling their orders. I would review current promotions in the sales program with them. I would make calls on retail dealers with either the distributor salesmen or the record manager, and would make calls on radio stations and with juke box operators.

Q. How were sales made to Southern Wholesalers of popular music, and by popular music I mean, of course, recorded popular music? A. They were sent from the factory each week—sample recordings along with order forms, plus an announcement sheet which gave particulars about the various records. The distributor, record manager and his
206 personnel listened to the samples, made up their orders and sent them in to the factory.

Q. What is the official weekly mailbag of the Record Department? A. That is a mailing that is made each week to distributors all over the country in which we include all of the current announcements of merchandise and other perti-

nent information to the distributors. Instead of sending them a number of letters from a number of individuals, we combined all into one folder and refer to it as the distributors' weekly mailbag.

Q. In this answer and in your next preceding answer, you used the expression "we sent." Can you tell us who it was who sent it, from whence it was sent? A. The mailbag was sent from Camden, New Jersey during the years in question, and later from New York, by someone in the home office.

Q. Where would the order forms for the popular music you mentioned earlier be sent from? A. They would be made up in Camden or in New York.

Q. I am not sure whether you testified how often those popular music order forms were sent out. A. Once a week.

Q. How were the sales of new releases of estab-
207 lished recording artists records sold? A. Do you mean symphonies and established repertoire and things of that kind?

Q. No. For example, I had in mind a Perry Como record which comes out in one week. How do you go about selling it?

THE COURT: Bear in mind we are talking about the fiscal years involved

THE WITNESS: They were sold on a standing order basis.

BY MR. ZELLER:

Q. Will you describe the standing order basis? A. The distributor would review his past sales record for each of the artists over the last three or four releases. And on the basis of that experience he would send it to Camden or into Indianapolis, send in a standing order, which meant that on subsequent releases by the artist in question he would automatically be shipped that quantity without having to submit a separate order. If he wanted to order quantities in addition to his standing order, that was entirely up to him if he

felt that the record warranted additional quantities. These orders were reviewed periodically by the distributor, depending upon his sales and depending upon the
208 popularity of the various artists.

* * * * * * * * * *

Q. On these orders which came in from distributors during this period, were they subject to acceptance by the home office? A. Yes.

* * * * * * * * * *

209 Q. During this period when you were the sales representative covering the Washington area, about how often did you get to Washington? A. About once every three weeks.

Q. On the occasion of those visits, did you ever make use of the office facilities of the Radio Corporation of America here in the District of Columbia? A. No.

* * * * * * * * * *

212 THE COURT: You have not developed from thi witness the facts which I have just suggested a few minutes ago. You have not brought out who were the agents of the representative during the period anterior. You have not brought out where they lived, whether or not they lived here, whether or not they had offices or whether they accepted orders in the District of Columbia or took orders or whether the orders came from the customers.

BY MR. ZELLER:

Q. Did your predecessors——

THE COURT: I am interested in knowing the facts.

MR. ZELLER: I have no objection to going over the same ground again. I did think that I brought out from this witness that during this three-year period there were no representatives whatsoever of the Record Department who lived in the District of Columbia or who had offices in

the District of Columbia. In case I should be in error on that, let me ask the question again.

BY MR. ZELLER:

Q. Will you tell us what the facts were with regard
213 to whether——

THE COURT: Let us take the individual. Does he know who represented the company in this territory? Who was the field sales representative prior to the time he assumed those duties?

BY MR. ZELLER:

Q. Fine. Let us have the names stated on the record. A. Karl Hildebracht, A. R. Bags.

THE COURT: How long did you know Mr. Hildebracht?

THE WITNESS: Hildebracht had been there for some years preceding this period and for perhaps some six months after.

THE COURT: How could that be when you say you started in April of 1951?

MR. ZELLER: You mean beginning in 1949 is what the witness meant.

THE WITNESS: Yes.

THE COURT: In 1949. Who was the representative at the beginning of 1949?

THE WITNESS: At the beginning of 1949 it was either Mr. Burgess or Mr. Doddlin.

THE COURT: Where did they live?

THE WITNESS: Where do they live now?

THE COURT: Where did they live then?

214 THE WITNESS: Either in Pennsylvania or in New Jersey.

THE COURT: Did they have any offices in the District of Columbia?

THE WITNESS: No, sir.

THE COURT: Go on down the line.

BY MR. ZELLER:

Q. Who succeeded those gentlemen? A. I do not recall the exact order of succession because there were quite a few chang s, but there was also a Mr. Odell who came in who called on the territory for a time, and the gentleman who immediately preceded me in the territory was a Mr. George Prutting.

Q. Where did Mr. Odell live? A. Mr. Odell at the time, I believe, lived in Philadelphia.

THE COURT: Do you know whether he lived in the District of Columbia?

THE WITNESS: I do not know—I know he did not live down here.

THE COURT: What is the next one?

BY MR. ZELLER:

Q. Where did Mr. Prutting live while he had this territory? A. For a time in Philadelphia and for a time
215 I think he lived in Connecticut.

Q. Are you sure he did not live in the District of Columbia while he had this territory? A. Yes.

THE COURT: All right, there were two questions you were going to ask him concerning the taking of orders.

BY MR. ZELLER:

Q. Do you know whether these gentlemen, these predecessors of yours did any more order taking than you did?

MR. WIXON: I object.

THE COURT: On what ground?

MR. WIXON: On the ground that he is being asked a question without any background for his testimony whatsoever.

THE COURT: He says he was connected with the department.

MR. WIXON: It is immaterial that he was connected. I am connected with the District of Columbia Government and

I do not know what is going on in the Department of Highways, for example.

THE COURT: His position was such that he would be familiar with it.

MR. WIXON: He has not so testified.

MR. ZELLER: He has so testified.

216 THE COURT: What was your position before?

THE WITNESS: I was assistant to the General Sales Manager of the Record Department.

THE COURT: Let us save time. Were you familiar with the orders received?

THE WITNESS: Yes, sir.

THE COURT: And the conduct of business?

THE WITNESS: Yes, sir.

THE COURT: I think it almost goes without saying that he would be. I think he would be competent to testify whether these men accepted or received orders from the District of Columbia or not. I am going to overrule the objection with that explanation.

BY MR. ZELLER:

Q. Will you tell us whether these gentlemen received orders in the District of Columbia or not, or whether they came directly to the home office? A. They came directly to the home office because the——

THE COURT, no, no.

THE WITNESS: They came directly to the home office.

THE COURT: You know that of your own knowledge?

THE WITNESS: Yes, sir.

MR. ZELLER: I have no further questions.

217 CROSS-EXAMINATION

BY MR. WIXON:

Q. You say you came here once every three or four weeks when you occupied that position? A. Yes.

Q. How long did you stay, generally speaking? A. Anywhere from a day to five days, usually two days.

* * * * * * * * * * *

224 Q. Was there any other distributor in the District of Columbia for those records besides Southern Wholesalers? A. No.

Q. Was there any other distributor who had the same territory as that covered by Southern Wholesalers? I am not speaking about location in the District of Columbia, but I am speaking about one which covered the same territorial suggested operational area. A. No.

Q. What did you do when you came to Washington, Mr. Welker, on these visits? A. I called on the distributor, Southern Wholesalers.

Q. You called on whom? A. The distributor, Southern Wholesaler.

Q. What did you do when you got over there? A. Discussed current matters with the distributor record manager.

225 Q. Did you try to sell Southern Wholesalers any records? A. No.

Q. Do those records sell themselves?

THE COURT: Mr. Wixon, he has answered the question. He did not try to sell them.

BY MR. WIXON:

Q. Was there any attempt to solicit the sale of records by the Radio Corporation of America? A. By Radio Corporation of America, yes.

Q. Through what office was an attempt made to sell records, to merchandise the product? A. As I explained, through the weekly mailbag which was mailed to distributors.

Q. What was your capacity then? What did you come around for? What did you move around in this territory you covered for? A. To see if the distributor was servicing

his dealer orders promptly and properly, to help train his salesmen, to suggest promotions for advertising ideas through the distributor, which he might use, and to answer any questions which he might have regarding policies of the company that applied to him.

Q. Do I understand you correctly to mean that you did not solicit the sale of records and that you never suggested to a distributor that he purchase a quantity of records
226 from the Radio Corporation of America of one type or another or of one title or another. You never suggested that such a purchase be made? A. If he asked me, yes.

Q. But you never yourself said to your distributor, "I recommend you buy a certain number of a certain type of a certain title of record because you certainly will have excellent sales with it."? You never made that suggestion? Only on a question would you make a statement; is that right? A. I would recommend some merchandise.

Q. You would recommend some merchandise? A. Yes.

Q. You would recommend the purchase of it by the distributor from the Radio Corporation of America; isn't that correct? A. Yes.

Q. What were the terms of delivery on the sale of these records to Southern Wholesalers? A. They were sold to Southern Wholesalers FOB Washington, D. C.

Q. Who were the sales representatives of the Radio Corporation of America during that time? You were the representative of RCA during that time while you visited, were you not?

THE COURT: He has testified to that.

. . . . . .

229 BY MR. WIXON:

Q. Did you bring the distributors advance information of intended releases? A. Sometimes.

Q. And that might be in order that they might have the advantage of placing orders if they wished to do so for the releases which were to come out sometime later; is that right? A. Yes.

Q. That would be in addition to your mailbag information? A. Usually it was the same material.

Q. But it came out ahead of it? You brought it with you? A. Not necessarily, no.

Q. Did you bring information about advance releases of records or did you bring information about records which would be released in advance of information given to
230 these distributors in the mailbag? A. Sometimes, yes.

Q. As a consequence of that, you managed to sell records to distributors, that is, through your advance information?

MR. ZELLER: It calls for the operation of the distributors mind.

THE COURT: I do not think so.

MR. ZELLER: He asked "as a consequence." How can Mr. Welker testify what led this gentleman to take the step of placing the order. Now, if counsel wants to ask whether orders followed that, I have no objection and we will draw our own conclusions.

THE COURT: I think the witness will know whether or not any orders were procured. He said did you sell it, and that is all he is asking the witness—what he did as a result of the information. I understand the witness to testify he did not take any orders at all.

MR. WIXON: No. He changed that testimony.

THE COURT: He did?

MR. WIXON: Yes, sir.

MR. ZELLER: I do not believe there was a change.

THE COURT: He did testify he took some orders.

MR. WIXON: Yes, he did.

231 THE COURT: Then he can testify as to whether or not, as a result of obtaining this information, he obtained an order. He can answer yes or no.

THE WITNESS: Yes.

. . . . . .

THE COURT: Mr. Welker, did you have an advertising fund with respect to your records?

THE WITNESS: Yes, sir.

THE COURT: Did you contribute part and the distributors contribute part?

THE WITNESS: Yes, sir.

THE COURT: Did they have any letter of appointment of the Southern Wholesalers, Incorporated?

THE WITNESS: I believe so, sir, although I never
232 saw it myself.

THE COURT: Do you know where the letter is?

THE WITNESS: Yes, I would assume it would be in Southern Wholesalers file.

THE COURT: Do you know where the carbon copy is?

THE WITNESS: It would be in one of our offices.

THE COURT: Suppose you found that they were not conducting the business the way you thought they should? What would you do?

THE WITNESS: Discuss it with them.

THE COURT: Did you have occasion to discuss the matter with them during the taxable years involved, do you remember?

THE WITNESS: Yes, sir; there were certain things that we would have to discuss.

THE COURT: Just what were the things you discussed?

THE WITNESS: Well, if I did not think they were properly servicing the dealers by getting merchandise out to them.

THE COURT: What would you do on that? What affair was it of yours?

THE WITNESS: Well, we wanted our products distributed efficiently so that the general public would buy it when it was advertised.

THE COURT: Did they take your suggestion?

233 THE WITNESS: Sometimes.

THE COURT: What happened when they did not?

THE WITNESS: Well, sometimes nothing happened.

THE COURT: Was it a mere suggestion?

THE WITNESS: It was a suggestion, not much more than that. It was not a threat. I could suggest things to them and of their own free will, if they did not think it was a good idea and I was not able to convince them it was, so generally the matter was dropped.

THE COURT: But you were interested in knowing how they ran the business?

THE WITNESS: Yes, sir.

* * * * * * * * * * *

235 Whereupon

FRANCIS H. ENGEL

was called as a witness on behalf of the petitioner, and, having been first duly sworn, was examined and testified as follows:

THE COURT: Will you please give your name and address to the stenographer?

THE WITNESS: Francis H. Engel, 3906 Virgilia Street, Chevy Chase, Maryland.

DIRECT EXAMINATION

BY MR. ZELLER:

Q. What is your occupation? A. I am manager of the Washington office of the Engineering Products Division.

Q. Where is your office located? A. 1625 K Street.

Q. How long have you been with the Radio Corporation of America? A. Off and on about thirty years. I had a slight break in service, but it is approximately thirty years of active service.

* * * * * * * * * * *

236 Q. When did you first come to the Washington office in the Engineering Products Division? A. About September 1939.

Q. Can you tell us in a general way what products are manufactured and sold by the Engineering Products Department? A. Well, to put it simply, they are the products that we have not mentioned today, or have not been mentioned today. The ones that I am primarily interested in are basically military specially designed equipment for the government, but, over and above that, special equip-
237 ment such as public address systems, theater motion picture equipment, scientific instruments, that type of equipment which is not the usual material that you buy off the shelf.

THE COURT: Not the usual material?

THE WITNESS: That is right. We call it engineering products.

* * * * * * * * * * *

BY MR. ZELLER:

Q. With respect to commercial equipment, such as
238 communications, broadcast, industrial, theater, that sort of thing, how is that sold within the District of Columbia? A. Well, I am only familiar with the sale of it to the District Government and the Federal Government. I do not normally concern myself with the sale of it to dealers and distributors. I have no jurisdiction there at all. The equipment that is sold with my knowledge is done by the specialists who travel from the various district offices, usually Philadelphia or New York. We have these specialists who cover these areas just as was described for the other products, and they travel and take care of that type of selling.

Q. Speaking during this three-year period and suppose you had an inquiry from a theater in the District of Colum-

bia, you, yourself, had an inquiry from a theater in the District of Columbia as to whether a certain type of motion picture sound apparatus was available and, if so, at what price? What would you do with that inquiry? A. I would refer it to the dealer or the specialist when he came through or, if it was important, I might drop him a line or call him on the telephone and tell him his customer was interested in the information.

* * * * * * * * * *

239 BY MR. ZELLER:

Q. Are any of these specialists, I believe you called them, who are employed by the Engineering Products Department and who handle these sales of commercial apparatus, are any of them under your supervision and direction? A. No, they are not.

Q. Will you describe for us what the functions of your office are, Mr. Engel? A. Yes. My office basically is in Washington to assist the Federal Government, and particularly with respect to the military equipment such as radar, sonar, communications equipment, and so forth. I would say that the activity is 99½ per cent along that line.

THE COURT: You say help them. What do you mean by that?

240 THE WITNESS: The government is large and complex and they need to know lots of things. They know they want to do something and do not know how to do it because they have to write the specifications, and they call on us, and we talk to them and tell them what is going on in the electronics business and that you can accomplish a certain result by doing this, that and the other. We will help them to write a specification in competition with other manufacturers and take our chances on getting the bid on it. All they know is that they want a vacuum cleaner, to use a homely example, and we tell them what a vacuum cleaner is and how they should specify it to be made to be sure they

get a good one. It may not be ours. That is left to competition.

BY MR. ZELLER:

Q. Can you tell us how many employees you had in your Washington office during the years 1949, 1950 and 1951? A. From memory I would say it was never less than three men and never more than five, including myself, and two or three correspondence secretaries and two or three office girls. It is a relatively small organization.

Q. Do these three men have any particular qualifi-
241 cations for their jobs? A. Yes, they are all engineering graduates, or engineering background.

* * * * * * * * * *

Q. During these three years tell us exactly what you did with reference to the sales to the government?

THE COURT: I thought he said he helped the government.

THE WITNESS: We have no sales contact and actually do not make the sales. We do not have a quota. Anything bought is bought by invitation to bid and is sent to various manufacturers and is not done through the office, and flows directly to the customer from our home office. We do not have an order book. We do not take orders. We assist our company to meet the customer so that they can get together and work efficiently to arrive at a mutual understanding of what they want and what they are willing to pay for. In other words, we are an intermediary, a liaison
242 between the two.

* * * * * * * * * *

Q. Will you tell us what use of the facilities of your office —and by that I mean desk space and secretarial assistance and so forth were made—was made by people in other departments of the Radio Corporation of America than the

Engineering Products Department during these three years in question? A. They made no use of our facility.

Q. Was there any rule against their use, to your knowledge? A. No, not any expressed rule. There was no need for it. They had no need for it particularly.

* * * * * * * * * *

CROSS-EXAMINATION

BY MR. WIXON:

Q. Was there any officer of the Radio Corporation of America, to your knowledge, during these years who
243 was in over-all charge of the activities of the Radio Corporation of America in the District of Columbia? A. I think not. I say I think not. I am sure there was not.

Q. They all operated within themselves independently as separate units? A. Yes, sir; we had our spheres of activity. I happened to be in charge of my little sphere of activity but there was no general overseer.

* * * * * * * * * *

244 Q. Does the division maintain traveling representatives for the sale of its product? A. Every district office has field men, as has been mentioned here before. I do not know too much about that operation. That is out of my bailiwick.

THE COURT: I do not think I quite understand
244 the answer, Mr. Wixon. The other divisions which manufacture and sell other products than those over which you have some control or have something to do, and you have testified that they have in some instances traveling representatives who go around and service these various districts. But Mr. Wixon asked you whether or not your division, such as the Engineering Division, that is, the division to which you are attached, has taken care of equipment for theaters and other commercial organizations and do they have any traveling men.

THE WITNESS: I cannot answer that accurately. The products are so varied that no one person could really know intimately all the various types.

THE COURT: You mentioned something about a representative coming in from the outside, did you not?

THE WITNESS: Yes, that is right. We call them from either Camden or from the home office to come down. Suppose the government wanted to buy an electronic microscope, certainly I could not tell them the details about that. I would ask Camden to send them in.

THE COURT: An engineer or a salesman?

THE WITNESS: I want an engineer and not a salesman.

BY MR. WIXON:

Q. You are not too familiar with the operation of the Engineering Products Department except as it re-
246 lates to the particular engineering field with which you are connected? A. The government phase of it. I do not have anything to do with the rest of it.

Q. These gentlemen, you say, who work with you, are they engaged in the same activity essentially as you? A. Yes, that is right.

Q. Was it part of your duties or the duties of any of those associated with you to be aware of the desires of the Federal Government for equipment? A. Oh, yes. We would naturally be aware of it because they would tell us about it and ask for advice and information. We could not help but know.

Q. I would assume that the Federal Government is constantly soliciting bids of manufacturers for electronic equipment. A. That is right.

Q. Was it your office which obtained those solicitations? A. No. That is all done actually by mail. All these bids are sent to the home office, the invitations to bid, let us be accurate; and, in return, if our company is interested, they will return that invitation with a bid on the papers provided.

. . . . . .

247 REDIRECT EXAMINATION

BY MR. ZELLER:

Q. Assume, Mr. Engel, that the books and records of the Engineering Products Department were kept during these years for sales made to customers located in the District of Columbia to show the following breakdown of classes of customers: Franchise distributors, manufacturers, affiliated companies, miscellaneous, and the United States Government. Now, with which of those classes of customer would your office have had to deal? A. One hundred per cent, I would say, with the government. One-half of one per cent to take care of that miscellaneous, and I don't know what is in there but it is essentially 100 per cent government.

* * * * * * * * * * *

251 MR. ZELLER: May we have this document marked for identification?

(Total sales to D. C. customers, 1949, 1950, 1951, was marked Petitioner's Exhibit No. 1 for identification.)

* * * * * * * * * * *

258 BY MR. ZELLER:

Q. Do the figures shown on Petitioner's Exhibit No. 1 for identification correctly set forth the sales made by the Radio Corporation of America to customers located in the District of Columbia for the years 1949, 1950 and 1951? Will you answer yes or no? A. To the best of my knowledge, the answer is yes.

MR. ZELLER: I renew my offer, your Honor.

MR. WIXON: May I inquire, your Honor, just a
259 few questions on this?

THE COURT: Yes.

* * * * * * * * * * *

264 BY MR. WIXON:

Q. Based upon your position with the Radio Corporation of America, based upon your familiarity with the books and records of the Radio Corporation of America, are you able to state whether, in your opinion, the items shown on Petitioner's Exhibit No. 1 for identification, which is the sheet you have before you, fairly represents the sales made by the Radio Corporation of America to District of Columbia business organizations or individuals or customers for each of the years 1949, 1950 and 1951 in the amounts in total for 1949 of $4,379,484.54; for the year 1950 of $6,516,117.66, and for the year 1951 of $5,202,093.57? Do those figures fairly and accurately represent the actual sales made in the District of Columbia? A. In those in-

265 stances where the merchandise was delivered or the service was rendered within the District of Columbia, yes.

Q. No other adjustment would be made or would be required to be made in order to produce a correct determination of what we may term District of Columbia sales; is that right? A. I know of none.

MR. WIXON: We have no objection to submitting it.

. . . . . .

266 THE COURT: Have you objection to this?

MR. WIXON: No.

THE COURT: It will be received as Petitioner's Exhibit No. 1.

(Document heretofore marked for identification as Petitioner's Exhibit No. 1 was received in evidence.)

MR. ZELLER: Will you please mark these as Petitioner's Exhibits 2 and 3 for identification?

(Calculations of sales reports were marked Petitioner's Exhibits 2 and 3 for identification.)

. . . . . .

267 MR. ZELLER: I offer Petitioner's Exhibits 2 and 3 for identification into evidence, your Honor.

* * * * * * * * * * *

270 THE COURT: Have you any objection to these documents going into evidence?

MR. WIXON: No, but I would like to ask for this
271 reservation, that I might wish to inquire further with respect of elements I have discussed with the witness.

* * * * * * * * * * *

THE COURT: We will receive those in evidence as Petitioner's Exhibits 2 and 3.

(Documents heretofore marked for identification as Petitioner's Exhibits 2 and 3 were received in evidence.)

* * * * * * * * * * *

278 Whereupon

FRANCIS H. ENGEL

resumed the stand, and, having been previously duly sworn, was examined and testified further as follows:

DIRECT EXAMINATION

BY MR. ZELLER:

Q. Mr. Engel, will you tell us during the years 1949, 1950 and 1951 if there were any employees, officers, agents or representatives of the Engineering Products Department residing in Washington, D. C., other than yourself and the men under your supervision and direction? A. There were none.

Q. Would your answer be the same if I asked you if the Engineering Products Department employees, officers, agents or representatives of salesmen, and so forth, had office space in the District of Columbia? A. They had no office space.

Q. Other than yourself and the men under your supervision and direction? A. That is right.

279 Q. Now, Mr. Engel, I show you a copy of Petitioner's Exhibit No. 3 and invite your attention to the first three categories of figures shown on that exhibit; namely, franchise distributors, manufacturers and affiliated companies. Now, can you tell us how those sales were made?

MR. WIXON: If your Honor please, I object. This gentleman, as I understand it, is not a salesman.

THE COURT: He might know how the sales were made.

MR. WIXON: Unless he has a function with the company respecting the making of the sales. It is my understanding from his testimony that he has disavowed any knowledge of the sale of the products.

THE COURT: No, that is not my understanding. If anyone called him up and wanted a sale, he told him to go over to or turned him over to a distributor. I think if he knows of his own knowledge, I think his position as head of this Washington group would be enough to give him knowledge, if he does have knowledge. I think you ought to ask him if he does have knowledge.

BY MR. ZELLER:

Q. That is what I meant to imply. Can you tell how the sales were made? I will ask a preliminary question.

280 Do you know how these questions were made, Mr. Engel?

THE COURT: Of your own knowledge.

THE WITNESS: Yes, I do.

BY MR. ZELLER:

Q. Will you tell us how they were made? A. They were made by representatives of the company from out of town who came into town for the purpose of making sales. I had nothing to do with them, or my organization.

* * * * * * * * * * *

Q. Mr. Corbett, can you tell us how much of the Tube Division's gross sales for the years 1949, 1950, and 1951 represented sales of services as distinguished from sales of tangible products?

MR. WIXON: I object.

* * * * * * * * * * *

285 Q. Just tell us now, if you please, how you know the breakdown as between sales of services and tangible products by the Tube Division for these three years. A. It is part of my job with the Tube Division to record the sales on the Tube Division books of all products sold. I immediately supervise the people who do the coding of the invoices received. I have established the chart
286 of accounts which indicate the type of products sold and I know for a fact that there are no codes established on Tube Division books for these years or at the present time to record the sale of any services.

THE COURT: Services where?

THE WITNESS: In any place.

THE COURT: You do not sell any services?

THE WITNESS: No.

* * * * * * * * * * *

313 Thereupon

JAMES H. HICKEY

was called as a witness by and on behalf of the petitioner and, having been first duly sworn, was examined and testified as follows:

THE COURT: Give your name and address to the reporter.

THE WITNESS: James H. Hickey, Collingswood, New Jersey.

DIRECT EXAMINATION

BY MR. ZELLER:

Q. What is your street address in Collingswood?

314 A. The Parkview Apartments.

Q. What is your occupation, Mr. Hickey? A. I am manager of the government administration for the TV Division, the TV Division of the Radio Corporation of America.

Q. Where is your office located? A. Camden, or Cherry Hill right now, New Jersey. It is out of Camden.

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315 Q. You said you took care of the Fairfax account. Will you explain in some detail what you did, exactly what you did, in that connection? A. Well, the Fairfax was a pet account of Mr. Elliott. Mr. Elliott was the executive vice-president. He called on them fo many years, and so did I when I was with Zenith, and when I came with RCA he asked me to call on them to promote the sales of RCA merchandise with them.

Q. Where did Fairfax have its offices? A. Seventh and H Streets, Northwest, Washington, D. C.

Q. During these three years, 1949, '50 and '51, did you come to Washington to call on Faifax? A. Infrequently, maybe two or three times a year.

Q. Tell us what you did when you called on Fairfax.

316 A. Well, I promoted RCA products with them and the sale of RCA products for their stores throughout the country.

THE COURT: That doesn't mean very much, Mr. Hickey. You say "promoted". Just what did you say? What did you do?

THE WITNESS: Well, Mr. C. D. Kaufman, who was the head of Fairfax, or Rosenthal, or Kay Jewelry Stores, as they are variously known, is more or less a prestige call, a good-will call.

THE COURT: Did you take any orders?

THE WITNESS: Never took an order from them.

* * * * * * * * * * *

BY MR. ZELLER:

Q. During your visits to Washington to call on Fairfax, can you tell us whether or not you ever called on any retail stores in Washington? A. No, I didn't.

Q. Will you tell us what use, if any, you made of the various office facilities maintained by RCA in the
317 District on the occasion of these visits to Fairfax?

A. We didn't use that office at all. Another department had that office.

* * * * * * * * * * *

322 CROSS-EXAMINATION

BY MR. WIXON:

325 Q. Did Fairfax Distributing Corporation, to your knowledge, take any particular amount of merchandise manufactured by RCA by way of a quota? A. No, sir.

Q. You say you promoted the sale of RCA products through Fairfax Distributing Corporation. When
326 you came to Washington did you suggest to Fairfax they buy an additional amount of products, that they buy a particular type of product? Just what did you do in promoting these sales of RCA Victor products? A. I asked them to promote the sales of RCA Victor products? A. I asked them to promote the sale of RCA radio and television throughout their stores. Each individual store orders their merchandise.

Q. Beg your pardon, sir. A. Each individual store orders their merchandise. Fairfax, in Washington, do not purchase as a block of merchandise or a quantity of merchandise.

Q. I take it they had sto.es in Washington? A. Yes, sir.

Q. Do you know how many at that time, in those years? About? A. About twelve.

Q. About twelve. And you say each one of those stores independently ordered—— A. That is right.

Q. —the merchandise desired from RCA? A. That is right.

Q. Now, did you go to those various stores? A. No, sir.

Q. Well, in promoting the sale of these products
327 you certainly, of course, did more than merely visit Mr. Kaufman, I believe you said—— A. Yes.

Q. —and discuss the nation's security with him. You discussed your products, I take it, with him? A. That's right.

Q. Did you, in addition, suggest to him the purchase of products? A. I suggested to him the pushing of our merchandise through his stores. They would bulletinize their stores.

Q. Bulletinize means what, sir? A. Sending out bulletins regarding new merchandise, new sets we brought out from time to time.

Q. Did you advise him as to the availability of new types of merchandise, new designs? A. After they were designed, we advised him whether we could ship them; yes, sir.

Q. No. When you came to Washington and talked with him, Mr. Hickey, I suppose there must have been certain times when you had information respecting a new product. Did you talk to him about the new product? A. Yes.

Q. Suggest to him that he buy or purchase those products A. I would suggest that he advise his stores to
328 buy those products.

Q. Well, in effect, you were suggesting that the Fairfax Distributing Corporation buy the products, I take it; is that right, sir? A. I think that's right, yes.

Q. I think you said you came here several times a year, two or three times a year, on the average. Did you come here more often in any one of those years, to your recollec-

tion? A. Yes. In 1951 I was contacting the Navy for government business.

Q. How many times did you have occasion to come to Washington that year? A. Very frequently.

Q. Well, —— A. I couldn't tell you the number.

Q. You understand "very frequently" has different connotations. What do you mean by "very frequently"? A. Probably two or three times a month.

Q. Would you then talk with Mr. Kaufman of the Fairfax Distributing Corporation? A. No, I did not.

Q. How many times during that year did you talk with Mr. Kaufman? A. Two or three times, more or less;
329 maybe four times. I can't give you the exact number of times.

Q. How long would you stay here on your visits to Fairfax Distributing Corporation? A. Just the one day; come in the morning and out in the evening.

Q. Are you familiar with or were you familiar at that time with the Southern Wholesalers' account? A. Yes.

Q. Do you know whether they were on a quota system? A. On a quota system?

Q. Yes, sir. A. They were on a DQA system.

Q. That is an allocation, I believe. A. Allocation.

Q. Of certain—— A. Quarterly allocation.

Q. Beg your pardon. A. Quarterly allocation.

Q. Why was Fairfax Distributing Corporation not on the same basis as Southern Wholesalers? A. Because they agreed with Mr. Elliott many years ago they wouldn't stock any merchandise. That is why their stores—the orders came in from each individual store. They would buy them in small quantities, as they needed them.

Q. This Fairfax Distributing Corporation—what
330 products did it handle? A. Well, jewelry——

Q. For RCA? A. —was their main line.

Q. No. I meant for RCA. A. RCA—radio and television.

Q. Did they sell those products at retail? A. Did Fairfax?

Q. Yes, RCA products at retail. A. Yes.

Q. At the same time they held a position as distributor for RCA? A. Well, their stores sold it at retail, and they bought it the same price the distributors, other distributors, bought it.

Q. Were these stores separate corporations? Do you know? A. That I don't know.

Q. Did you ever go to Southern Wholesalers, sir? A. Yes.

Q. What was your purpose in going to Southern Wholesalers? A. Meetings.

Q. Meetings? A. Sales meetings.

330 Q. Would you attend at those meetings with the sales representative of the RCA Victor Products Division? A. Yes.

Q. Who was that during those years? A. Mr. Polikoff.

Q. How often did you go—do you recall—in 1949? A. To Southern Wholesalers? Q. Yes.

Southern Wholesalers?

Q. Yes. A. That I couldn't answer. I wouldn't know.

Q. In 1950—— A. Maybe once; maybe twice. It all depends on the promotions we had at the time.

Q. In 1950 would you have any recollection? A. No, I wouldn't.

Q. 1951?

THE COURT: If you mean, no say "No".

THE WITNESS: No.

MR. ZELLER: Say "No", Mr. Hickey.

THE WITNESS: No.

BY MR. WIXON:

Q. This visit, I understand, was a promotional visit, had as its intent the moving of RCA Victor products through Southern Wholesalers. A. Not all the time. Accounts like

332 Hecht's or Woodward's would have a meeting where the officers of the company would come down and I would attend those meetings.

Q. In other words, the officers of these department stores, I take it, would have meetings relative to the sale of their products? A. Not only that, but maybe the twenty-fifth anniversary of handling the merchandise.

Q. I understand, then, you would go to these department stores, attend those meetings as a representative? A. Of RCA.

Q. Of RCA, of course. And I suppose your object at those meetings was to assist the personnel of those department stores, insofar as they they might have any problems with respect to the sale of products, and also to suggest to them methods or means whereby they might be able to implement their sales of RCA Victor products? A. No, it was more or less the building up of the prestige.

Q. The prestige. I am certain that RCA has considerable of it. Now, what did you do with respect to building up prestige? A. Well, it helped the account, for instance, if Woodward or Hecht would have a meeting and four or five officers of the corporation would come down and at-

333 tend the meeting.

Q. Well, they had a meeting for a purpose, obviously. A. Well, as I said, several of these meetings—say the twenty-fifth anniversary, of handling the merchandise, or the twenty-fifth anniversary of being in business, or the fiftieth anniversary or the individual being there for—the last one I remember was at Hecht's—he was there for twenty-five or thirty years. So, they gave him a party or a dinner, which Southern Wholesalers sponsored, and we would come down as a guest.

Q. While you were at these meetings did you do anything? A. There was no business transacted at these meetings.

Q. Never had any suggestion about the availability of RCA products just as a casual aside? A. Not at these meetings, no.

Q. These meetings that you speak of—I differentiate in my own mind between a party and a meeting. Now, when

you talk of a meeting, what do you mean? A. Well, the other times we were down at Southern Wholesalers was when we were promoting a new product and then you would have a meeting with Southern Wholesalers' sales organization.

* * * * * * * * * *

340 BY MR. ZELLER:

Q. Mr. Hickey, I invite your attention to the statement made on Page 5 of Petitioner's Exhibit 9 for
341 identification—for identification, I suppose I should say now, your Honor—and I quote:

"All instruments are sold by RCA Victor F.O.B. point of manufacture. The terms of payment of a shipment under any order are subject to approval by the Credit Department of RCA Victor."

* * * * * * * * * *

342 Q. Do you know whether any sales were made to Southern Wholesalers or Fairfax Distributing Company on any other terms than those during those three years? A. I do not.

* * * * * * * * * *

343 BY MR. ZELLER:

Q. Are you familiar with the terms and conditions on which sales are made——

THE COURT: Were made.

BY MR. ZELLER:

Q. —or were made during these years? A. Yes.

MR. WIXON: Objection. We are not talking about sales, your Honor, generally, I think.

THE COURT: All right. I will overrule the objection. Go ahead.

BY MR. ZELLER:

Q. Are you familiar with the terms and conditions upon which sales were made specifically to Southern
344 Wholesalers and the Fairfax Distributing Company? A. Yes.

Q. Only one other question on redirect, your Honor, and that is this: To your knowledge, did Fairfax handle television and radio receivers manufactured by competitors of RCA during these three years? A. Yes, they did.

* * * * * * * * * *

346 Q. Are you familiar with the terms of each sale made by Home Instruments to Southern Wholesalers? A. The terms outlined in this policy.

Q. Are you familiar with the terms? A. I am familiar.

Q. Of each sale? A. Each one?

Q. Yes, sir. A. Yes, sir.

Q. Do you know that? A. Yes, sir.

* * * * * * * * * *

350 Thereupon

WILLIAM L. HOPKINS

was called as a witness by and on behalf of the petitioner and, having been first duly sworn, was examined and testified as follows:

THE COURT: Give the reporter your name and your residence.

THE WITNESS: William L. Hopkins, 29 Mountwell Avenue, Haddonfield, New Jersey.

351 DIRECT EXAMINATION

BY MR. ZELLER:

Q. Will you tell us your occupation, please, Mr. Hopkins? A. I am a field salesman in the Tube Division, Equipment Sales Section, operating out of Harrison, New Jersey.

Q. Was that your position during 1949, '50 and '51? A. Yes.

Q. What was your territory during those years? A. Baltimore, Washington, Philadelphia and south.

Q. During those years where did you reside? A. In Haddonfield.

Q. I show you a copy of Petitioner's Exhibit 2, which shows the sales of the Tube Department of RCA, the customers located in the District by classes of customers, and I ask you which of those seven classes of customers were handled by you. A. Item 4, manufacturers.

Q. Now, in the course of your covering of this territory during these three years, how often did you come to the District of Columbia? A. About four times a year.

Q. Now, will you state for the record who your principal customers in and around the District of Columbia are?

• • • • • • • • • •

352 BY MR. ZELLER:

Q. Well, give us the names of all the customers in or around the District of Columbia that you can.

• • • • • • • • • •

THE WITNESS: National Electronics Laboratory, National Radio Institute, United States Recording, Schuttig, and—I'm trying to think—I think G. B. Linderman. I may have missed several. They are in the District of Columbia.

Q. Now, when you called on these customers within the District, tell us what you did. A. Purely to go in on a basis of trying to establish tubes in equipment, RCA tubes in equipment, that the customer was building for resale purposes.

Q. Can you explain a little further, Mr. Hopkins, what you mean by establish RCA tubes in the equipment which the customer was manufacturing? A. If the customer was in the process of designing or engineering a piece of equip-

ment which required various types of tubes to be
353 used in the various applications in the equipment, if we had tubes in our line that were suitable for that, we would mention those types to him. There were times also when we would have been called in from an inquiry that he had sent in to come in and help him.

Q. Would you tell us on how many occasions of these visits you were actually given orders by the persons on whom you called? A. You mean actual orders handed to me?

Q. Yes, sir. A. None whatsoever.

Q. Now, on these occasions of your visits to Washington, how long would you stay? A. About two nights to get three days in. Q. And during those visits—I mean during the two or three nights that you were here—did you call only upon the customers in the District of Columbia? A. No, also in the outlying area, in Maryland and Virginia.

Q. During these three years did you, yourself, maintain any office facilities in Washington? A. No, sir.

Q. Would you tell us what, if any, use you made during these three years of the office facilities maintained in
354 the District by the Radio Corporation? A. The Tube Division, as such, had no office space in Washington until about 1951. However, the office space that was here in Washington was used primarily for my secretary to contact me of any calls that may have come into my office, and I used it purely for that, as a clearing house for any of those calls.

Q. Where was your secretary located? A. In Harrison, New Jersey.

Q. Did you, on the occasion of your visits to Washington, ever call on retail dealers in the District of Columbia? A. No.

Q. One thing that I may not have been clear on: Could you tell us what areas are comprised within, I think you used the expression, the southern area? What states are

included in those areas that you covered during those years? A. Anything from New Jersey to Florida.

Q. And how far west? Into Rochester, New York.

Q. And down, I take it, on a line? A That is right, but I would also like to qualify that. The Rochester did not come in until after 1951.

355 CROSS-EXAMINATION

BY MR. WIXON:

Q. Mr. Hopkins, I understood from your testimony that you were a tube salesman for the Tube Division; is that correct? A. That is correct, sir.

Q. Was there a gentleman over you? A. Yes.

Q. What was that gentleman's name during those years? A. Mr. Martin.

Q. Was he the sales manager or did he have a title comparable to that? A. Field sales manager of the equipment sales section.

Q. Were you the only salesman who came into this area for the Tube Division? A. As far as equipment sales were concerned, yes.

Q. Were there other types of sales? A. Yes.

Q. What other types would there be besides equipment sales? A. Sales to distributors, renewal sales.

Q. Now, I understood from your testimony that the purpose of your visits to these various organizations in Washington was to suggest the use of RCA Victor tubes? A. That is correct.

356 Q. Wherever those tubes could be employed? A. That is correct.

Q. In the particular product being manufactured or built? A. That is correct.

Q. Was there much of that activity during these years, that is to say, much manufacture of equipment by these organizations that you referred to? I don't recall any. A. Not in large volume, no.

Q. In dollar amount, do you have any idea? A. About twenty-five thousand dollars annually.

Q. That would be for the equipment, itself, or for the tubes? A. For the tubes.

Q. Used in them? A. That is correct. The value of the equipment—I would have no idea what he would get for that.

Q. You are speaking now of twenty-five thousand dollars, now, I suppose, of RCA Victor tubes? A. That is correct.

Q. Rather than any other type of tube? A. Well, we can qualify that and include those tubes made for government specifications—in other words, JAN, Joint Army-Navy.

357 Q. Did you have to do with the sale of tubes to those organizations? A. Not direct to the government. Only those manufacturers that were building equipment that had government end use.

Q. Did you ever on any of those occasions interest any of these organizations in the purchase of RCA Victor tubes. A. I certainly would try.

Q. You would know, would you not, whether, after your visit, it was concluded to use RCA Victor tubes in the particular equipment to be manufactured? A. I would know by virtue of the receipt of an order which would come in to my attention.

Q. On any of these occasions, did any of these people suggest to you that they would use RCA tubes, whether it was because of your salesmanship or because of their own inclination? A. I prefer to say it was because of the quality of the RCA tubes.

Q. I am sure it had to do with your salesmanship, too. A. Thank you, sir.

Q. But I mean did you get suggestions or statements that those tubes would be used in these products? A. Not positive statements.

358 Q. Well, positive, of course, we think of in the nature of a committal. A. Yes.

Q. But I am talking about an understanding that they would be used. A. Yes.

Q. How were you compensated by RCA? A. Salary.

Q. On a salary? A. And a sales compensation.

Q. Sales commission? A. No sales commission: a sales compensation.

Q. That again means nothing to me. What is a sales compensation? A. Well, it is a bonus plan.

Q. In other words, depending upon the amount of products you sold—— A. Not individually, but in the Tube Division for our particular section.

Q. Were there other people out besides yourself? A. Oh, yes, but not in this area.

Q. Was it measured in any respect by the amount of sales which were engendered theoretically as a consequence of your efforts here in this area? A. No.

* * * * * * * * * *

360 Q. Did the Tube Department, to your knowledge, during these years have a service organization here in Washington? A. No.

Q. Did you ever carry samples of tubes with you on your visits? A. No.

Q. Did you carry catalogs? A. No.

Q. You did all your work by word of mouth? A. Practically.

Q. Suppose somebody wanted to see one of these tubes, to test it; how would you—— A. And test it?

Q. Yes. Let's say I am building a piece of equipment and you have convinced me that RCA tubes are good tubes, but I want to see them in operation. How would I go about—— A. I would send you samples.

Q. You would send samples? A. Yes, sir.

Q. Would you ever bring samples? A. If I happened to be coming down on a visit and I would get a call prior to my leaving the office, I may have put them in my briefcase and brought them down, purely as a service.

Q. Were any orders ever taken by you as a conse-
362 quence of these visits? A. Taken by me?

Q. Yes. A. Personally?

Q. Yes. A. They were mailed in to me to my attention and then carried out.

Q. Did orders come to you after your visits? A. Yes.

Q. As a consequence of those visits? A. Yes. They could have resulted from my visits down here.

Q. Did they come to you, personally, any of them? A. They would come addressed to me. I may not have been in the office when they came, but it was just a clearing house through my office before they went to the warehouse for service.

Q. If I were here and wanted to send an order for tubes, let's say, to the Tube Department, would it be possible for me to just send an order to the RCA Corporation, Tube Department, saying, "Please send me a hundred tubes; here is my check"? Could that be done without addressing you, personally? A. Oh, yes.

Q. Would it be a reasonable conclusion to draw from your experience in merchandising during these years
363 that when those orders were sent directly to you it was a consequence of your activities here?

MR. ZELLER: I object, your Honor.

THE COURT: I will overrule the objection. He wants to know whether you think these orders were the result of your efforts, that is, the orders that came across your desk.

THE WITNESS: Well, as a salesman, I would say yes.

* * * * * * * * * * *

THE COURT: Let me ask you this: There was an office of the Tube Division in the District.

THE WITNESS: I believe that is correct. It was established about 1951 sometime.

THE COURT: Did you ever go to it.

THE WITNESS: Only using it as a clearing house.

THE COURT: What do you mean by "using it as a earing house?

THE WITNESS: When I would come down to the Dis-ict, my secretary was told I was going to be in Washington, ay, on Tuesday, Wednesday, Thursday; any customers, her than those in the District, or even in the District, that ight call my office and want to get in touch with me, that she was told she could contact our Washington office and
64 I would check in there by means of phone with the secretary in the Washington office, that I was in town, nd any phone calls she would hold for me and I would pick hem up.

THE COURT: In other words, let's say a manufacturing ompany wanted to get in touch with you and called your ffice in Harrison, your secretary would pick up the phone nd call down there and say if you called in to tell you that Manufacturer A wanted to see you?

THE WITNESS: That is correct, sir.

THE COURT: That is what you mean by——

THE WITNESS: That is correct.

THE COURT: No other use?

THE WITNESS: No, sir.

THE COURT: In any other way?

THE WITNESS: No, sir.

. . . . . .

BY MR. WIXON:

Q. Did you receive mail at that office during these years? A. No.

Q. Did anything ever come there to your attention? A. No.

365 Q. Did you advise any of these people in Washington with whom you dealt that you might be contacted at the office here in the District of Columbia? A. No.

. . . . . .

BY MR. WIXON:

Q. Did you ever get any calls while you were here at the Washington office? A. No. You mean from customers
366 in the District?

Q. While you were in Washington and you happened to go to two or three of these organizations—— A. Yes.

Q. —and they said, "Well, can we call you some place?", you never told them, "You might leave a message over at this office," the office you had in Washington, because you would be calling in later to find out if you had any messages? You never told them that? A. Oh, if I were in Washington and they wanted to get in touch with me and I was not over there at their place, they could call the District office, knowing I would be calling in there eventually and pick up that, the same as if they had called our Harrison office.

Q. That is what I meant. You did get calls from the District officer here from time to time when they were in this area; isn't that a fact? A. Yes.

* * * * * * * * * * *

Thereupon

HOWARD L. PETTIT

was called as a witness by and on behalf of the petitioner and, having been first duly sworn, was examined and testified as follows:

THE COURT: Give your name and address to the reporter.

THE WITNESS: Howard L. Pettit—P-e-t-t-i-t—~~444~~ Grant Avenue, Pitman, New Jersey.

DIRECT EXAMINATION

367 BY MR. ZELLER:

Q. Mr. Pettit, I show you a copy of Petitioner's Exhibit 1, which shows RCA's sales by the four product divisions to customers located in the District for the years 1949, '50 and '51, and I invite your attention to the second

line, record, and ask you whether the books and records of the Record Department are so kept that you can tell us how much of the figures shown on that line pertain to sales of tangible property on one hand and how much is de-
368 rived from other sources on the other. A. Our records are so kept.

Q. Now, what is included in income other than sales of tangible property? What are the sources of such income? A. The sources of income are from rentals derived from leased libraries of recorded music and syndicated programs and for recording services performed in our studios.

Q. Now, where are the studios in which recording services are rendered? Where are those studios located, Mr. Pettit? A. In New York City, Chicago and Hollywood.

Q. There are none here in the District? A. None in the District.

Q. During these years, 1949, '50 and '51, did the Record Department have income from rentals of, I believe you called it, the thesaurus service and the syndicated service from customers located here in the District of Columbia? A. We did.

Q. Will you tell us how much that was for each of the three years?

* * * * * * * * * *

370 BY MR. ZELLER:

Q. Will you tell us what the figures were for the three years in question, please? A. In the year 1949, $3,710.60; 1950, $12,859.89; 1951, $16,760.

THE COURT: Now, that is for these tangibles, services?

THE WITNESS: This is income from rentals of those library services.

MR. ZELLER: No further questions, your Honor.

THE COURT: The rest of it is records——

THE WITNESS: Merchandise, that is right.

THE COURT: Merchandise.

* * * * * * * * * *

Thereupon

CHARLES WILLIAM KRAUS

was called as a witness by and on behalf of the petitioner and, having been first duly sworn, was examined and testified as follows:

THE COURT: Mr. Kraus, give your full name and address to the reporter, please.

THE WITNESS: Charles William Kraus—K-r-a-u-s—415 White Horse Pike, Audubon, New York.

DIRECT EXAMINATION

377 BY MR. ZELLER:

Q. Now, I call your attention, Mr. Krause, to Petitioner's Exhibit 1, and particularly to the first line which shows the total sales to customers located in the District of Columbia by the Home Instruments Department for the years 1949, '50 and '51, and I ask you whether, at my request, you have had made, under your supervision and direction, a study of the customers to whom those sales were made? A. Yes.

MR. ZELLER: Will you mark this, please.

(Statistical tabulation headed "RCA Victor Home Instruments Department Sales Value (Including Federal Excise Tax) of Shipments into District of Columbia, Years 1949-1950-1951" was
378 marked for identification as Petitioner's Exhibit 10.)

. . . . . .

MR. ZELLER: I offer it, your Honor.

THE COURT: Any objection, Mr. Wixon?

MR. WIXON: Yes, sir. I would like to make an inquiry with respect to it.

. . . . . .

381 THE COURT: It will be received in evidence as Petitioner's Exhibit 10.

(Document previously marked for identification as Petitioner's Exhibit 10 was received in evidence.)

* * * * * * * * * *

382 BY MR. ZELLER:

Q. Now, Mr. Kraus, again I show you Petitioner's Exhibit 1 and invite your attention to the first line showing the sales for the Home Instrument Department to customers located in the District for the three years in question and ask you whether the figures shown on that line include any income for something other than sales of tangible products? A. No.

Q. Would you tell us whether or not the Home Instruments Department has and had during these three years any income from sources other than the sale of tangible products? A. For outside of the District?

Q. For the District of Columbia. A. There was no income from the sale of other than products.

* * * * * * * * * *

397 DOCKET

Date	Proceedings	Memorandum	
1954			Corporation
12/17	Petition filed. Taxpayer, Assessor's Office and Corporation Counsel served.	Franchise tax	
		1949	$24,695.83
		1950	58,330.31
1955		1951	21,268.28
Jan. 13	Hearing set for Feb. 9. All parties served.		
Feb. 3	Petitioner's motion for continuance—Granted to March 9. All parties served.		
Mar. 9	Entry of appearance Robert G. Zeller, Esq., John A. Gilmore, 63 Wall St., N.Y.		
Mar. 9	Hearing—Henry Wixon and George Donnella for District of Columbia.		

Mar. 10 Second day of hearing. Hearing adjourned to March 30.

Mar. 30 Hearing.

May 2 Petitioner's request for Findings of Fact and Conclusions of Law. Brief for Petitioner—motion for leave to amend petition. Copies served Corporation Counsel.

May 11 Order granting leave to amend petition—Amended petition filed. Copies served parties.

May 31 Brief filed by respondent. Copy mailed attorney for petitioner.

June 7 Reply brief for petitioner. Copy served Corporation Counsel.

June 7 Stipulation—Copies served parties.

June 29 Findings of Fact and Opinion—Copies served Corporation Counsel, Assessor's Office and attorney for petitioner.

July 15 Respondent's computation for entry of decision under Rule 30. Certificate of service.

July 19 Computation of tax under rule 30 filed by petitioner—computation same as that submitted by District of Columbia.

July 22 Decision—Copies mailed to attorneys for petitioner and respondent.

Aug. 8 Petition for Review filed by respondent—Certificate of service.

Aug. 25 Respondent's statement of points on review—designation of record. Service.

Sept. 6 Designation of additional portions of record by attorney for petitioner. Service.

Sept. 8 Order extending time for filing transcript of record on review. Service.

398 Date Proceedings Memorandum

Sept. 9 Amendment of Designation of Record filed by District of Columbia—Service.

Sept 19 Order for Delivery of Original Exhibits. Service.

PET'S EX. NO. 1

Radio Corporation of America's sales of products to customers located in the District of Columbia, by product departments, for the years 1949, 1950 and 1951 were as follows:

Department	*1949*	*1950*	*1951*
Home Instrument	$3,408,875.33	$5,282,511.93	$3,584,938.98
Record	261,529.41	308,190.87	424,864.39
Tube	440,829.70	574,767.65	724,257.98
Engineering Products	268,250.10	350,647.21	468,032.22
Total	$4,379,484.54	$6,516,117.66	$5,202,093.57

PET'S EX. NO. 2

The sales of the Tube Department of RCA to customers located in the District of Columbia during the years 1949, 1950 and 1951, by classes of customers, were as follows:

	Sales in		
	1949	*1950*	*1951*
1. Franchised distributors	51,798.74	127,338.72	192,183.47
2. Other distributors	213,476.95	193,444.99	213,864.12
3. Radio stations	71,351.71	6,664.28	4,492.61
4. Manufacturers	22,976.91	87,127.41	75,736.80
5. Affiliated Companies	40,289.40	69,563.62	38,893.08
6. Miscellaneous	5,014.63	1,903.71	1,144.37
7. U. S. Government	35,921.36	89,724.92	197,943.53
Total	440,829.70	574,767.65	724,257.98

PET'S EX. NO. 3

The sales of the Engineering Products Department of RCA to customers located in the District of Columbia during the years 1949, 1950 and 1951, by classes of customers, were as follows:

	Sales in		
	1949	*1950*	*1951*
1. Franchised distributors	67,891.45	153,320.52	104,711.31
2. Manufacturers	10,287.00	324.00	664.60
3. Affiliated companies	15,791.54	19,138.63	19,132.27
4. Miscellaneous	69,722.13	89,438.92	250,330.78
5. U. S. Government	104,557.98	88,425.14	93,193.26
Total	268,250.10	350,647.21	468,032.22

RCA VICTOR PET'S EX. NO. 10

HOME INSTRUMENT DEPARTMENT

SALES VALUE (INCLUDING FEDERAL EXCISE TAX) OF SHIPMENTS

INTO DISTRICT OF COLUMBIA

YEARS 1949-1950-1951

	Total	*Southern Wholesalers Inc.*	*Fairfax Distributing Co., Inc.*	*RCA Affiliated Companies*	*Other Customers*	*U. S. Government*
Year 1949—Total	3,408,875.33	3,330,918.18	59,677.25	6,671.71	11,608.19	
Year 1950—Total	5,282,511.93	5,184,251.96	67,315.17	18,603.77	12,341.03	
Year 1951—Total	3,584,938.98	3,538,464.63	28,541.81	10,404.89	7,068.61	459.04

FILED
JUL 9 1956
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

DISTRICT OF COLUMBIA,
Petitioner,

v.

RADIO CORPORATION OF AMERICA,
Respondent.

No. [redacted] 152

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ROBERT G. ZELLER,
Attorney for Respondent,
63 Wall Street,
New York 5, N. Y.

Of Counsel:

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Ground Upon Which Jurisdiction Is Invoked

Petitioner seeks under 28 U. S. C. §1254(1) a writ of certiorari to review a question of law upon which there is no conflict among the courts of appeals for the various circuits, upon which petitioner lost in the District of Columbia Tax Court and lost in the Court of Appeals for the District of Columbia Circuit by unanimous decision, and which can only affect the computation of franchise taxes payable to the District of Columbia for the taxable years 1949-1952.

Question Presented

The sole question presented by the petition in this case is: Did the court below err in holding that the respondent properly computed and paid its franchise taxes due to the District of Columbia for 1949, 1950 and 1951 when respondent allocated its total income between District and

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The sole question presented by the petition in this case is: Did the court below err in holding that the respondent properly computed and paid its franchise taxes due to the District of Columbia for 1949, 1950 and 1951 when respondent allocated its total income between District and

non-District income and paid taxes to the District thereon in accordance with regulations in effect during those years, and in holding that respondent did not have to reallocate its income for the taxable years 1949, 1950 and 1951 and pay taxes thereon in accordance with regulations which were not adopted until 1953?

Statement of the Case

Throughout the petition in this case there is present the implication that the judgment below relieved respondent of the burden of paying franchise taxes to the District of Columbia for the years 1949, 1950 and 1951 (Petition for Writ, pp. 1, 4, 26, 28).

This simply is not so. The finding of the trial court (the District of Columbia Tax Court) on this point was aptly summarized in the unanimous opinion of affirmance in the Court of Appeals as follows:

> "RCA seasonably filed with the Assessor of the District franchise tax returns for the calendar years 1949, 1950 and 1951 and paid the taxes disclosed thereby. The returns were prepared in accordance with the allocation provisions of the 1948 regulations." (Petition for Writ, App. A., p. 3a)

This case arises because in 1953, the Commissioners of the District of Columbia amended the allocation or apportionment provisions of the 1948 regulations under which the respondent's tax liability for 1949, 1950 and 1951 had been computed and which were in effect during those years; and purported to make such amendments applicable to taxable years beginning on and after January 1, 1948.

On the basis of these 1953 retroactive regulations, deficiencies were assessed against respondent for the years 1949, 1950 and 1951. The assessed deficiencies included interest aggregating approximately $23,000, appar-

ently on the theory that respondent should be penalized for not having had the foresight at the time of filing its returns for 1949, 1950 and 1951 to know that in 1953 the Commissioners of the District of Columbia were going to try to change the controlling regulations retroactively.

During the taxable years 1949, 1950 and 1951, RCA paid taxes on all of its income which in the judgment of the Commissioners of the District of Columbia was fairly attributable to the business carried on by RCA within the District. That judgment was expressed in regulations adopted by the Commissioners in accordance with the express mandate of the applicable statute. Now this Court is asked by the petition to substitute its judgment for the judgment of the Commissioners in deciding what part of RCA's income during the taxable years in question should have been considered to be fairly attributable to the business carried on by RCA within the District.

Throughout the petition in this case the 1948 regulations of petitioner District of Columbia which were in force during the taxable years in question are characterized by the petitioner as invalid (see Petition for Writ, pp. 4, 15, 22, 27, 28). Indeed, the District's 1948 regulations which were in effect during the taxable years in question and on the basis of which respondent computed and paid its franchise taxes are characterized by petitioner District of Columbia as "manifestly erroneous" (Petition for Writ, p. 15), and the promulgation of the purportedly retroactive 1953 regulations as a "recognition" by the Commissioners of the District of Columbia of the invalidity of their own 1948 regulations (Petition for Writ, pp. 14, 27).

There is not the slightest support in the record for any suggestion that the 1953 regulations were adopted because the Commissioners of the District of Columbia then believed that their 1948 regulations were invalid. On the

contrary, at the time of the adoption of the 1953 regulations, the Court of Appeals for the District of Columbia Circuit, as it expressly stated in its opinion in the case at bar (Petition for Writ, App. A, pp. 4a-5a), had considered and held valid the 1948 regulations in *Lever Brothers Company* v. *District of Columbia*, 92 App. D. C. 147, 204 F. 2d 39, decided on March 26, 1953. The 1953 amendment of the 1948 regulations which the petitioner has characterized here as "recognizing" the invalidity of the 1948 regulations was adopted on August 6, 1953 (Petition for Writ, App. B, p. 8b).

The 1953 regulations provide a new formula for apportioning income between District and non-District sources. The effect of the new formula in most cases is to increase the amount of franchise taxes payable to the District of Columbia by corporations making sales both within and without the District.

The only thing manifest about the adoption of the 1953 regulations is that the Commissioners in 1953 decided that the apportionment formula contained in the 1948 regulations did not produce as much revenue as was desired, and the Commissioners tried to increase the amount of revenue produced for the past as well as for the future.

This is disclosed in the petition itself:

> "The decision of the United States Court of Appeals for the District of Columbia Circuit, by approving regulations promulgated by the Commissioners of the District of Columbia in 1948 and rescinded by regulations promulgated in 1953 and made applicable to 1948, and to succeeding years has, in effect, materially reduced revenues of the District of Columbia which the Franchise Tax Act was designed to produce." (Petition for Writ, pp. 11-12)

In making the statement quoted above, the petitioner has apparently overlooked the report of the Senate Committee on the District of Columbia (Sen. Rep. No. 260, April 12, 1949) in connection with certain proposed and subsequently enacted amendments to the Income and Franchise Tax Act (Title IV District of Columbia Revenue Act of 1949, 63 Stat. 112, ch. 146). That report, made nearly a year after the adoption by the District of the regulations which the District now attacks, stated:

> "The experience of nearly a year in the administration of the act has enabled the assessing authorities of the District to analyze the act critically with respect to its substance as well as the practicability of its administration. From such experience, the assessing authorities have found that *for the most part the law has produced the revenue anticipated*, and has not been too difficult of administration." (2 U. S. Code Cong. Serv. 1310 [1949])

ARGUMENT

I

The attack by the petitioner upon its own regulations is merely an effort to avoid a controlling decision by this Court.

The District of Columbia Income and Franchise Tax Act of 1947, as amended by the Act of May 3, 1948, imposes a franchise tax upon every corporation for the privilege of carrying on or engaging in trade or business within the District. Respondent is concededly subject to the tax. The dispute is over how the income subject to the tax should be determined.

The Act provides (Section 2, Title X) that if the trade or business of a corporation is carried on both within and without the District "the net income derived there-

from" shall be deemed to be income from sources within and without the District; and that where the income of a corporation is derived from sources both within and without the District, "the portion thereof subject to tax" shall be determined *under regulations prescribed by the Commissioners of the District of Columbia* (Petition for Writ, App. B, p. 5b).

Under the express authority so conferred by the Statute (Section 2, Title X), the Commissioners duly promulgated apportionment regulations in 1948 which were in force during the taxable years 1949, 1950 and 1951 (Petition for Writ, App. B, pp. 5b-7b).*

The petitioner does not now contend that the regulations in force during the years 1949, 1950 and 1951 were incorrectly construed either by the District of Columbia Tax Court or by the unanimous Court of Appeals for the District of Columbia Circuit in the decision below.

The argument of the petitioner in this Court is that the 1948 apportionment regulations adopted by the Commissioners of the District of Columbia were an invalid exercise of the authority granted to those Commissioners by Congress. That argument is squarely in conflict with an earlier decision of the same Court of Appeals in *Lever Brothers Company* v. *District of Columbia*, 92 App. D. C. 147, 204 F. 2d 39 (1953), in which no petition for a writ of certiorari was even filed. In the *Lever Brothers* case, the Court of Appeals expressly considered and upheld the validity of the apportionment formula contained in the 1948 regulations—the formula whose validity is now attacked by the petitioner.

Moreover, the decision of the District of Columbia Tax Court in the present case that the 1948 regulations were

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* These regulations were first promulgated on August 31, 1948. They were again promulgated on January 7, 1949 and again on October 16, 1950, with certain minor changes which are in no way relevant to this case.

valid was not a novel decision. The validity of those regulations had twice before been upheld by the Tax Court in decisions in conformity with the mandate of the Court of Appeals in the *Lever Brothers* case and in *Owens-Illinois Glass Company* v. *District of Columbia,* 92 App. D. C. 15, 204 F. 2d 29 (1953).

The controlling decision of this Court, as the Court of Appeals recognized, is *Helvering* v. *R. J. Reynolds Tobacco Company,* 306 U. S. 110.

The rule of the *Reynolds* case, *supra,* is that where there is a valid regulation in force during a particular taxable year which governs the determination of tax liability, a regulation adopted after the close of such year changing the prior valid regulations so as to impose additional tax liability will not be given retroactive effect.

This is particularly true of the "legislative" type of regulation involved in this case, where the tax statute expressly directs the Commissioners to supply the regulations providing how the amount of income subject to the franchise tax is to be determined if the taxpayer has income from sources both within and without the District of Columbia.

The assault by the petitioner upon the validity of its own regulations is a recognition by the petitioner that the principal authority which it relies upon is otherwise not applicable. *Manhattan General Equipment Co.* v. *Commissioner of Internal Revenue,* 297 U. S. 129, is only authority that a subsequent regulation may be applied to measure the tax of an earlier year where the regulation in effect during the earlier year "is a mere nullity" (297 U. S. at 134).

Where the earlier regulation is valid, the rule of the *Reynolds* case, *supra,* is applicable, and it is the retroactive provisions of the subsequent regulation which are treated as a "mere nullity."

II

The 1948 apportionment regulation was not invalid.

The basic argument of petitioner in this Court is that the apportionment formula adopted by the Commissioners of the District of Columbia in the 1948 regulations was invalid because the regulation exceeded the power granted the Commissioners by Congress in the tax statute.

Section 2, Title X of the District of Columbia Income and Franchise Tax Act of 1947, as amended (§47-1580a, D. C. Code 1951), is the controlling section in this case. It deals with apportionment of income derived from business carried on both within and without the District. It states, in part, that:

> "Sec. 2—Allocation and Apportionment—
>
> "* * * If the trade or business of any corporation or unincorporated business is carried on or engaged in both within and without the District, *the net income derived therefrom shall, for the purposes of this article, be deemed to be income from sources within and without the District.** Where the net income of a corporation or unincorporated business is derived from sources both within and without the District, *the portion thereof subject to tax* under this article shall be determined under regulation or regulations prescribed by the Commissioners." (Petition for Writ, App. B, pp. 4b-5b)

The only income of respondent is the net income derived from its trade or business which is carried on both within and without the District of Columbia. The "portion thereof" subject to tax is to be determined *under regulations prescribed by the Commissioners of the District of Columbia.*

* Emphasis supplied throughout.

As regards income from sales of tangible personal property partly within and partly without the District (the only kind of income in issue in this case), the Commissioners decided that the portion of such income to be apportioned to the District should be such percentage of the total as the District sales bore to total sales.

The Commissioners went on to provide that "District sales" should mean "all sales made which were principally secured, negotiated or effected by owners, employees, agents, officers and branches of the corporation or unincorporated business located in the District • • •" (Petition for Writ, App. B, pp. 6b-7b).

It is the "located" test in the above regulation upon which petitioner premises its argument that the 1948 regulations were invalid because they were contrary to the provisions of the basic statute, and particularly to the amendments to that statute made by the Act of May 3, 1948 (see Petition for Writ, pp. 13-14).

The apportionment regulation containing the "located" test was adopted by the Commissioners immediately *after* the passage of the amendments to the Income and Franchise Tax Act of 1947 by the Act of May 3, 1948, *supra* (see Petition for Writ, App. B, p. 5b). That regulation employing the test of sales activity of personnel located in the District was a contemporaneous interpretation and a valid interpretation of the legislative intent in amending the statute.

To upset the holding of the Court below and find the regulation invalid in the face of the broad grant of authority to the Commissioners, there would have to be a clear indication in the statute that income which was not apportioned to the District under the 1948 formula was *required* by the statute to be apportioned to the District. If a different apportionment is not mandatory under the statute, the regulations duly prescribed by the Commis-

sioners of the District of Columbia are valid and were properly upheld by the Court of Appeals for the District of Columbia in the *Lever* case in 1953 (*op. cit. supra*) and in this case in 1956.

The petitioner seeks to create the impression that the 1948 apportionment formula employing the test of "located" personnel is an absurd or patently erroneous test. It is no such thing. The State of South Carolina employs the same test in almost identical language in the apportionment formula contained in the income tax statute itself. Thus, Section 65-233 of the South Carolina Code, 1952, provides that if the principal business of a foreign corporation in South Carolina is selling tangible personal property within the State, such foreign corporation shall pay an income tax upon a proportion of its entire net income computed upon the basis of the arithmetical average of:

> "* * * (a) the ratio of the value of the real estate and tangible personal property in this State during the income year to the value of the total real estate and tangible property during the income year with no deductions on account of encumbrances thereon and (b) the ratio of the total sales made within this State during the income year which were *principally secured, negotiated or effected by employees, agents, consignees, officers or branches of the taxpayer resident or located in the State* to the total sales made everywhere during such income year."

Likewise, the State of Tennessee employs an allocation formula using, among others, the test of "located" personnel of a corporation doing business by selling tangible personal property both within and without the State. Section 1316(2) of the Tennessee Code, 1934.

The 1948 regulation of the District Commissioners is fair and non-discriminatory. Corporation A, having no

occasion for frequent contacts with Government regulatory agencies, does not have a District office. Corporation B, a competitor, has an office in the District for purposes other than sales activity. Both companies sell merchandise through traveling salesmen coming into the District. The petitioner now appears to contend that Corporation B should pay a franchise tax *measured by all sales to District customers*, whether or not those sales constituted any part of the function of the Washington office. Corporation A escapes taxation completely.

The Commissioners reasonably concluded in 1948, on the basis of the Act of May 3, 1948, that the income of a corporation derived from selling merchandise to District customers should be apportioned to the District only if the corporation actually engaged in selling merchandise either directly through branch offices or through resident agents located in the District of Columbia. The Commissioners so provided in the 1948 regulations, the validity of which has been consistently upheld by the court below in this and in earlier cases.

Conclusion

The petition for writ of certiorari should be denied.

Respectfully submitted,

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